### United States Court of Appeals for the Second Circuit



# APPELLANT'S BRIEF & APPENDIX

## 75-1037

UNITED STATES COURT OF APPEALS
for the Second Circuit

Docket No. 75-1037

CHARLES GREEN, FRED SMITH and ALBERT GRASSO,

Appellants

- against -

UNITED STATES OF AMERICA,

Appellee

ee SECOND CORCUIT

1975

On Appeal from the United States District Court for the Eastern District of New York

BRIEF AND APPENDIX FOR APPELLANTS

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### STATEMENT

Albert Grasso, Charles Green and Fredrick Smith appeal from Judgments of Conviction entered in the United States District Court for the Eastern District of New York on January 10, 1974, after a denial of motions for a new trial and after twelve weeks of trial before the Honorable Mark Constantino, United States District Court Judge, and a jury.

The appellants were all found guilty on Count 14 of a fourteen-count indictment, of which only five counts were before the jury.

Count 14 charged a conspiracy among 23 persons in violation of 18 U.S.C. Sec. 371 to steal items of personal property from foreign commerce in violation of 18 U.S.C. Sec. 659.

Judge Constantino sentenced Charles Green to a term of two years, to serve six months and the remainder on probation; Albert Grasso to a term of imprisonment for eighteen months; and Fredrick Smith to two years, all but six months of which was suspended and also three years probation after imprisonment.

The appellants are presently at liberty under bail pending the determination of this appeal.

### REFERENCE TO OTHER BRIEFS

Pursuant to Rule 28(i) of the Federal Rules of

Appellant Procedure, the appellants hereby incorporate
by reference all points raised in the briefs of appellants,

Neil Pacilio and Carmine Picora and Raymond Coughlin,

who were also tried and convicted of the same offenses
at the same trial.

### STATEMENT OF FACTS

Pursuant to Rule 28(i) of the Federal Rules of
Appellant Procedure, the appellants hereby incorporate
by reference the Statement of Facts in the brief of
appellants, Neil Pacilio and Carmine Picora.

All references are to pages of the official transcript as filed and made part of the record.

The trial, which was estimated by the prosecutor,
David Ritchie, to last three weeks, was commenced over
objection without alternate jurors. [8]

Phillip Dawson, the first government witness said that it was "Whitey Bencevenga showed him how to alter tallies."

[p. 27 - Index 92]. Dawson was allegedly told by Fred Smith that if you stole you would have to turn in the goods to Frigid Express, otherwise you could get beat up. [p. 32 - Index 92].

In August, 1972 "whitey" altered Dawson's tally at the Brooklyn Pier 11 (hereinafter called "Pier 11"). [p. 36 - Index 92]. Altering tallies means that when a driver picks up a delivery at the Pier, the checker counts the goods, he records it on a piece of paper called a tally. When broken cartons are delivered which are short in weight, the checker makes a notation of that fact on the tally. What Bencevenga did was to put additional notations on the tally. Bencevenga would then break open whole cartons of frozen

seafood and prepare new empty cartons to match the number of notations added to the tally and thereby procuring to himself several whole cases of seafood. [p. 40 - Index 92]

In the second week of August, 1972, Dawson on his own altered more tallies [p. 46 - Index 92]. When Dawson requested money from Bencevenga, he was told to wait because John Macchirole had to go to Florida to get the money.

[p. 58 - Index 92].

Dawson stole from several piers in New Jersey between
July, 1972 and September, 1972 [199]. He identified
several Government exhibits as naving been altered or
signed by him. [213, 217] Dawson expressed a dislike for
the petitioner, Fred Smith, because Smith had told Neil
Pacilio that Dawson had stolen goods from Pacilio's trailers.
[232] Dawson was twice convicted for possession of
heroin. He was an addict, supporting his habit at the
time in question. [237] He sold the goods he stole on his
own [248], and with several other Government witnesses,
Jasper Lester and Keith Lofton [279].

While in the service, Dawson was on charges for several violent acts which charges were dropped in return for his request to be discharged. [311-313] The Prosecutor was in possession of this information and did not inform the Court when requested.

Victor Juruz was the security officer on Pier 11 on

September 22, 1972. He testified to the procedures for a truck and driver to obtain access to the pier. This procedure involved obtaining a gate pass, presentation by the driver of either a registration or a driver's license, and the taking of a regiscope photo of the above two items and the driver in a composite photo [503]. The driver and the person named on the gate pass were not necessarily the same [652]. After this photo the driver checked in with the delivery clerk to make sure all paper work was in order. He was then assigned a checker who counted the boxes as they went into the truck and recorded it on his tally [506]. The driver is then given tallies by the checker and he returns to the delivery clerk for completion of paper work and clearance on his gate pass to leave the pier.

On the 22nd day of September, 1972 the "Clifford Maersk" unloaded at Pier 11 on the 25th day of September, Mr. Juruz was informed that there were several items of missing seafood out of that particular shipment. He checked the tallies at the delivery clerk's office and found several notations. [517] On the 26th day of September, Mr. Juruz went to Merchant's Cold Storage warehouse in Manhattan (hereinafter called Merchant's) and viewed the load and photographed it.

Mr. Juruz made this information available to agents of the Waterfront Commission. One of the boxes that Merchant's had which was claimed to have been made up after the delivery of the load contained only one piece of flounder fillet, a four by four inch piece; there was testimony that whenever such cartons were made up the actual goods delivered were placed in said carton. This delivery was a delivery of frozen shrimp.

Several checkers who prepared the tallies in government's exhibits 1-169 testified that some of the items were not placed thereon by themselves. [884-1334] The checkers said that the tallies were usually turned over to the driver, however, they were often given to the runner—the man who normally directs the activities of a company's drivers on the pier. [1028] There was testimony that even checkers made notations and other alterations on the tallies themselves.[1296,1329]

Gerard Ruggiero, the delivery clerk on Pier 11, testified to the fact that in his duties of checking and comparing tallies, bills of lading and delivery book pages, he took money from Whitey Bencenvenga to ignore excess notations on tallies presented by or for Bencenvenga. Ruggiero said he had received tallies from the defendant driver Anthony Bamonte, but when asked to identify Bamonte he became unsure

and withdrew his identification. [1458] In most instances he had no recollection of who had given him tallies. [1484] Ruggiero crossed off notations on delivery book pages at the request of Bencevenga. [1530-1532] He said Bencevenga would sign for several drivers in the delivery book using names other than his own. [1579] He also altered tallies himself. [1596] Ruggiero testified that Raymond Coughlin signed the delivery book after turning in tallies given to him by someone else on the 22nd day of September, 1972. [1660]

Anthony Bencevenga testified that he was in charge of stealing. [1777] He said that one night in May or April of 1972 he went down to the Frigid Express yard with Neil Pacilio, his brother-in-law and that because there were too may thefts of goods by the black drivers that they wanted a share in those proceeds. [1789] The trial court subsequently found that this meeting constituted the agreement for the conspiracy. However, drivers continued to operate independently of this alleged conspiracy. [1933]

According to Bencevenga, Charlie Green was merely on the Frigid premises looking for work. [2057]

Bencevenga had a long backround of stealing. [2078] He would give the orders and if the helpers and/or drivers didn't obey they did not work. Bencevenga and Charlie Green

were enemies. [2121] But to work Green had to follow orders. Bencevenga retracted testimony that Albert Grasso had altered a tally. [2123] Bencevenga pleaded guilty to having stolen shrimp on September 22, 1972, but on cross-examination he denied having stolen it. [2137]

Fred Smith and others were told to stay away from the Frigid premises by Neil Pacilio in the beginning of September, 1972. [2470] Government called other witnesses, Keith Lofton, Jasper Lester, Johnny Valentine all to the effect that they had stolen goods in conjunction with one another and with Whitey Bencevenga. The Government next called several witnesses to introduce bills of lading and to determine value of the goods stolen.

As will be expounded in argument Point III, the Trial Court placed a de facto time limit on jury deliberations during the closing days of the trial.

The Government introduced expert witnesses to identify signatures and alterations on tallies and delivery book pages. The expert's qualifications were deemed marginally sufficient by the trial court. The handwriting expert said that based on the exemplars of Albert Grasso, Charles Green and Fred Smith they did not make the exceptions or signatures on the documents in question. [4429]

The trial court dismissed nine of the fourteen counts of the Indictment, and three of the defendants.

Several other important facts are considered and the various points of arguments in the Brief proper.

Albert Grasso, Charles Green and Fred Smith were found not guilty of any of the substantive counts of the Indictment, however, in what appears to be a compromise verdict as discussed in Point III of the argments, infra, they were convicted on the abbreviated conspiracy count.

Petitioners motions for a new trial denied.

### ARGUMENT

### POINT I

THE PETITIONERS' CONVICTION WAS OBTAINED IN VIOLATION OF DUE PROCESS BECAUSE THE GOVERNMENT FAILED TO SUSTAIN ITS BURDEN OF PROOF, I.E., PROOF BEYOND A REASONABLE DOUBT, THAT EACH INDIVIDUAL APPELLANT HAD THE REQUISITE KNOWLEDGE TO BE CONVICTED OF A CONSPIRACY TO VIOLATE 18 U.S.C. SEC. 659 UNDER 18 U.S.C SEC. 371.

The definition of conspiracy as in 18 U.S.C. Sec.

371 requires that "two or more persons conspire either to
commit any offense against the United States, or to defraud
the United States or any agency thereof in any manner or for
anyypurpose, and one or more of such persons do any act to
effect the object of the conspiracy, ...."

Conspiracy, like any other offense, requires both an act and an accompanying mental state. The agreement constitutes the act, while the intention to thereby achieve the objective is the mental state. There is, of course, the requirement of the overt act.

There are two intents required for the crime of conspiracy. Every conspiracy involves an agreement so there must be proof that the parties intended to agree, but it is also necessary to determine what objective the parties intended to achieve by their agreement. Developments in the Law Criminal Conspiracy, 72 Harv. L. Rev.

920, at p. 936. Merely joining a group is not sufficient; a conspiracy is not a group but an act. It must be joined with an intent to achieve the object. Thus, a "conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself". Developments in the Law, supra at p. 939. Thus as set out in Commonwealth v. Benesch, 290 Mass. 125, 194 N.E. 905 (1935), to be found guilty of a substantive offense scienter is not required but to be found guilty of a conspiracy to commit that offense, it is required. Therefore, all the elements required under 18 U.S.C. Sec. 659 must have been proven to have existedand have been known to the minds of the individuals charged. And the proof must be sustained beyond a reasonable doubt. U.S. v. Alsonso, 486 F. 2d. 1339 (2d. Cir. 1973). cert. granted 416 U.S. 935 (1975), U.S. v. DeMarco, 488 F. 2d. 828 (2d. Cir. 1973).

This Court has consistently followed this principal.

It was set out in the oft quoted example by one of America's greatest jurists, Learned Hand, in <u>U.S. v. Crimins</u>,123

F. 2d. 271, (2d. Cir. 1941)

"But is does not follow, because a jury might have found him guilty of the substantive offense, that they were justified in finding him guilty of a conspiracy to commit it. Courts do indeed say that each conspirator is chargeable with the acts of his fellows done in furtherance

of the joint venture; but into that must be read the condition that acts so imputed must be in execution of the venture as all understand it; not indeed in its details, but so far as concerns those terms which constitute the substantive crime. It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the participants, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding. Langer v. United States, 8 Cir., 76 F. 2d. 817, 826,827; Fulbright v. United States, 8 Cir., 91 F. 2d. 210, 213, 214; McLeroy v. State, 120 Ala. 274,25, So. 247; Powers v. Commonwealth, 110 Ky. 386, 61 S.W. 735, 63 S.W. 976, 53 L.R.A., 245; Gabbard v. Commonwealth, 193 Ky. 460, 236 S.W. 942. Cf. Neal vs. United States, 8 Cir., 102 F.2d. 643, 648. And this is equally true when the crime which the conspirators have agreed upon, is one of which they severally might be guilty though they were ignorant of the existence of some of its constituent facts. While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past." U.S. v. Crimins, supra, p. 273.

The validity of this reasoning has been followed in <u>U.S.</u>

<u>v. Vilhotti</u>, 452 F. 2d. 1186, (2d. Cir. 1971) cert.

denied 406 U.S. 947; <u>U.S.v. Jacobs</u>, 475 F. 2d. 270

(2d. Cir. 1973) Cert. denied 414 U.S. 821; <u>U.S. v.</u>

Alsondo, U.S. v. DeMarco, supra.

In <u>U.S. v. Jacobs</u>, <u>supra</u>, a conspiracy was alleged to have been entered into to transport securities in interstate commerce knowing that said securities were

stolen. Even though the Government securities no longer qualified as securities due to cancellation and voiding upon cashing, the court said that a conspiracy to so transport them or causing the "securities" to be transported in interstate commerce could be found if there was proof of the intent to transport them as securities. As the Government conceded and the court maintained the only question in a conspiracy count is what the parties contemplated not what actually occurred. Thus, evidence must prove the required intent. Assuming arguendo that there was an agreement in the instant case, the evidence did not prove that the petitioners individually knew that the goods were in foreigh commerce or that each had the intent to steal goods which were in foreign commerce.

The same logic was again upleld in <u>U.S. v. Alsondo</u>, <u>supra</u>, where the defendants were accused and found guilty of an assault upon a federal official and of having conspired to assault a federal official. This court held that the specific knowledge that the assault victim was a federal official has to be proven in order to establish a conspiracy to violate the statute prohibiting such conduct. However, such proof of the specific knowledge is not required to convict on the substantive

offense.1

Thus, to an average truck driver when a vessel discharges its cargo on our shores, and he is in possession of documents from a stateside owner to pick it up, he cannot have an inkling as to the fact that the law will say the shipment is in foreign commerce nor will any of his mental processes make that distinction, nor was there any proof from which a jury could infer that any of the petitioners was in possession of any knowledge which would lead him to that conclusion. The prosecution may have established a prima facie case that would have sustained a conviction under 18 U.S.C. Sec. 659 by intro-

The distinctions drawn in <u>U.S. v. Alsondo</u>, <u>supra</u>, on rehearing are inapplicable here due to acquittal of these defendants on the substantive counts.

ducing into evidence the way bill or invoices to establish the foreign commerce character of the shipments, but it failed in any other respect to establish that the object of the alleged conspiracy was to steal from foreign commerce.

While the Alsondo and DeMarco cases refer to an improper charge on this principle, which effected substantive rights, how much more are the substantive rights of these petitioners affected when the Government failed to establish at all that each of these individuals had the necessary knowledge in order to conspire to violate 18 USC Sec. 659.

This is apparent in the summation wherein the prosecutor, presenting the government's case in its best light, referred to these bills of lading as establishing the foreign commerce character and made no reference to the petitioneer's knowledge thereof. Appendix page 61.

### POINT II

ALL PETITIONERS WERE DENIED THEIR RIGHTS OF CONFRONTATION AND OF A FAIR TRIAL BY THE TRIAL COURT'S DENIAL OF THE RIGHT TO INQUIRE INTO THE FINDINGS OF A PSYCHIATRIST WITH WHOM A PRINCIPAL GOVERNMENT WITNESS HAD CONSULTED.

At page T1 and T2 in the Appendix, the trial court excluded any testimony in regard to communications between a government witness and the witness's psychiatrist. As the Government conceded in a brief submitted after the issue arose and during the trial, no psychiatrist-patient privilege exists in the Federal courts. No such privilege as between an ordinary physician and patient existed at the Common Law. 8 Wigmore Evidence, Sec. 2380 (McNaughton rev. 1961) and such privilege arises only by statute. (The pioneer state in this respect was New York in 1828). The present statute is N.Y. CPLR Sec. 4504, Appendix S-2. Even if this law of the forum applies in a federal prosecution in New York, Connecticut Life Ins. Co. v. Union Trust Co., 112 U.S. 250 (1884), the New York Courts have limited its application in the interest of justice.

The court in <u>People v. Preston</u>, 13 Misc. 2d 802, 196
N.Y.S. 2d 542 (Kings County, 1958), while considering the
invocation by the prosecutor of a patient's statutory privilege, to prevent the defendants from obtaining medical records,

and whose privilege it was to invoke and balancing whether disclosure should be allowed, said " .....if the disclosure disproves the guilt of the defendant, the patient's claim should ordinarily be overruled. Disallowing the disclosure may constitute reversable error." People v. Preston, supra at p. 557 of the N.Y.S. See also People v. Lay, 254 App. Div. 372, 5 N.Y.S. 2d 325 (1938), aff'd 279 N.Y. 737, 18 N.E. 2d 686.

As the last quoted section would clearly indicate, the trial judge must make some inquiry into the nature of the testimony and not merely to allow the patient's determination to prevail. Cf. Wonneman v. Stratford Securities Co. 23 F.R.D. 281 (S.D. N.Y. 1959), which involved the attorney client privilege, held that the question of whether the matter into which inquiry was sought is privileged is for the court rather than the witness to decide.

This court in <u>U.S. v. Masino</u>, 275 F. 2d 129 (2d Cir. 1960) at p. 133 said, "Indeed, where principal witnesses appearing in behalf of the prosecution have engaged in illegal practices and are accomplices to the crime charged, it is essential to a fair trial that the court allow the defendant to cross-examine such witnesses as widely as the rules of evidence permit."

In Gordon v. U.S., 344 U.S. 414 (1953), the Supreme Court, in relation to the exclusion of documents and transcripts of prior proceedings in order to impeach a government

witness said:

"We are well aware of the necessity that appellate courts give the trial judge wide latitude in control of cross-examination, especially in dealing with collateral evidence as to character. Michelson v. United States, 335 U.S. 469. But this principle cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony. Reversals should not be based on trivial, theoretical and harmless rulings. But we cannot say that these errors were unlikely to have influenced the jury's verdict. We believe they prejudiced substantial rights and the judgments must be reversed." Gordon v. U.S. supra, p. 442, 443.

See also <u>Smith v. Illinois</u>, 390 U.S. 129 (1968); <u>Alford v. U.S.</u>, 282 U.S. 687 (1931); <u>Pointer v. Texas</u>, 390 U.S. 400 (1965).

Petitioners pray that because the exclusion of this evidence affected their substantial rights, it was an abuse of the trial judge's discretion and the convictions must be reversed.

### POINT III

IT WAS ERROR TO SUBMIT THE CASE TO THE JURY WITH A DE FACTO TIME LIMIT UPON DELIBERATIONS AND TO ACCEPT THE JURY'S VERDICT AS IT WAS TAINTED WITH COERCION AND UNDUE INFLUENCE, AS SHOWN BY A JUROR'S AFFIDAVIT WHICH WAS IMPROPERLY REJECTED AS A BASIS FOR A MOTION FOR A NEW TRIAL.

At the commencement of trial, because of the withdrawal of some jurors for personal reasons, a question arose
as to whether the trial should proceed without alternate
jurors. Upon the statement of the United States Attorney
that the trial might last as much as three weeks (Appendix
p. T-3), four defense attorneys consented to proceeding.
One defense attorney and the United States Attorney objected.
The Court ruled that the trial would proceed without alternates. Defense attorney Rosen objected. The trial lasted
twelve weeks.

At the beginning of the eleventh week of trial, jurors five and eleven made known to the Court that they had vacation plans commencing that weekend. The Court thereupon promised these jurors that it would not hold them past the following Tuesday, July 23rd (Appendix p. T-4,5,6). To juror five, the Court said, "You will be leaving on Wednesday, I make that promise."

To keep its promise, the Court pushed the trial forward. Late sessions were held on Friday, July 19th, and

Monday, July 22nd. On the latter date, summations ran past eleven o'clock in the evening. During the course of discussions at the bench, the Court stated:

"THE COURT: Mr. McGuire, all I want to advise you is that the overnight period, we have this jury--we have three of them who said they will not come back to this Court on Wednesday, we have two who are going out of the country Wednesday morning, we will not be able to get them, and I am not pressing. I couldn't care if it lasted another week, it doens't bother me, that is not my problem." (Minutes at 4773-4774).

Defense counsel, Rosen, warned of the danger of a compromise verdict. (Appendix p. T-7).

On Tuesday, July 23rd, the Court began its instruction to the jury at 11:50 a.m., and the jury retired to deliberate at 12:40 p.m. Testimony was read at the jury's request at 6:00 p.m. The verdict was rendered at 9:50 p.m.

A trial judge must always keep in mind thepossible, if not probable, effect of any statement which he may make in the course of a trial or in instructions to the jury.

<u>U.S. v. Link</u>, 202 F. 2d. 592 (3rd Cir. 1953).

An express promise to two jurors that the trial would end at least by the date of their vacation was an abuse of discretion by the trial judge. If the jury couldn't reach a verdict, longer deliberation would have been required. The fact that testimony was reread indicates dissension among the jurors. If a minority wished to hold out, it would not be possible. Conflicting views had to be reconciled to insure

the vacationers leaving on schedule. Such a circumstance breeds coercion and extortion, because an acceptable verdict was a prerequisite to curtail further deliberation.

The trial judge placed a de facto deadline on the jury, in promising a termination by a certain date. Error is claimed because normal jury deliberation had not occurred.

While a juror may not testify as to the subjective intrusions of outside influences, a juryman may testify to any facts bearing upon the question of the existence of any "extraneous influence," although not as to how far that influence operated upon his mind. So a juryman may testify in a denial of or explanation of action or acts or declarations outside of the jury room, where evidence of such acts has been given as a ground for a new trial. U.S. v. Mattox, 146 U.S. 140, 149 (1892), Woodward v. Leavitt, 107 Mass. 453, 9 AR 49 (1871).

The jury should pass upon the case free from external pressure tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that there has been any interference with the administration of justice be tolerated. <u>U.S. v. Mattox</u>, supra.

Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, unless their harmlessness is made to appear. U.S. v. Mattox,

supra. The possibility of a hung jury loomed ever present; as the jury, during deliberation, had testimony reread to them, and it appeared that they were far from unanimity.

Once again, consideration must be given to jurors five and eleven's desires that the trial be completed by a certain day. As noted in <u>U.S. v. Mattox</u>, <u>supra</u>, it can be inferred that a jury must have an open mind and clear head to deliberate properly and fairly.

Submitted as Appendix Al is an Affidavit from juror eight which reflects not only facts already apparent on the record and referred to above, but also shows that actual coercion arising out of the planned vacations occurred in the jury room.

It was well recognized at common law that a juror may not be heard to impeach his own verdict. A qualification to the general rule is that he can show a matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself, e.g. that a juror was improperly approached by a party, or as in the instant case, that two jurors reminded the indecisive or dissenting minority of their pending vacations. Juror Canegallo was unduly influenced by the others' statements. See Perry v. Bailey, 12 Kan. at 118, which quoted Wright v. Itlinois and M. Tel. Co. 20 Iowa 195 (1866).

Jurors may testify as to the fact of misconduct of

others in their presence or hearing or as to outside influences brought to bear upon them. Bickom v. State, 286 So. 218, 23 (Miss. 1973). A motion alleging jury misconduct must be supportedby affidavit of a juror or some other person who was in a position to know the facts. Story v. State, 502 S.W. 2d 764 (Tex. 1973). (Appendix A-1)

The trend of the law is that on a motion for a new trial, the trial judge should heed a juror's testimony as to any "extraneous facts" which may have influenced the verdict and which were before the jury while deliberating. Such inquiry would be for determining the purity of the process leading to the verdict. Wilson v. State, 296 So. 2d 774, U.S. cert. denied, 296, So. 2d 778 (1974).

In weighing a juror's affidavit impeaching a verdict, public policy must be balanced against the probable injury to the defendants and the supposed ends attainable in the administration of justice. A strict rule of exclusion would often suppress the best evidence available of misconduct and prevent a juror from righting the wrong inflicted upon a defendant. Where an affidavit alleges misconduct which may have influenced the findings its exclusion achieves stability of jury verdicts, but only at the expense of doing injustice to the parties. Courts must not only consider public policy reasons for finality but also heed the harm a defendant may be exposed to if a prejudicial verdict is rendered against

him. Note: Impeachment of Jury Verdicts, 53 Marq.

L. Rev. 258, 274.

### POINT IV

THE PETITIONER, FRED SMITH WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONT A WITNESS WHO GAVE TESTIMONY AGAINST HIM, AND WAS DENIED A FAIR TRIAL BY THE PROSECUTOR'S ATTEMPTS TO INTRODUCE EVIDENCE ABOUT FRED SMITH'S BROTHER.

During the course of the trial, Fred Smith's counsel became the object of an investigation along with several of counsel's other clients by the Federal and State Governments in another district. At one point during the trial, said counsel was required to appear before a New Jersey State Grand Jury. Counsel and Fred Smith requested that the trial judge in this case accept a waiver by defendant of his counsel's presence for the morning of the following day, appendix pages T-8 through T-12, which the court accepted and which acceptance is not claimed aserroneous.

However, for reasons beyond his control, counsel, was detained longer than anticipated in Trenton,

New Jersev. Fred Smith was unable to reach his counsel and in conjunction with the government witness giving seemingly inculpation testimony, he approached the court first through one of his co-defendants' counsel and then on his own. He told the trial judge that it had become absolutely

essential to have his own counsel cross-examine the witness. The Court in effect said that if Fred Smith's counsel returned before the end of the witness's cross-examination, he would allow him to cross-examine but that the court would sit until such time as the cross-examination of said witness required and if Fred Smith's counsel did not return on time, Smith had waived that right. Appendix, pages T-13 through T-16.

The next day that the court sat, Fred Smith's counsel explained his absence to the court and the possible effect on his ability to adequately represent not only Fred Smith, but all of the other four defendants he was representing. Appendix, page T-17.

Counsel failed to object on behalf of Fred Smith as Fred Smith had done for himself at the last session.

Because of the substantive rights affected, Fred Smith prays that this court will take cognizance of such failure as being plain error under Rule 52(b) of the Federal Rules of Criminal Procedure 18 U.S.C.

The United States Supreme Court held or explicitly recognized that a person's constitutional right of confrontation is violated where he is given no opportunity to cross-examine any of the witnesses arrayed against him:

Re Oliver 333 U.S. 257, (1948); Re Murchison, 349

U.S. 133 (1955); Willner v. Committee on Character

and Fitness, 373 U.S. 96 (1963); Brookhart v. Janis,

384 U.S. 1, (1966); Specht v. Patterson, 386 U.S.

605 (1967); Re Gault, 387 U.S. 1 (1967); Jenkins v.

McKeithen, 395, U.S. 411, (1965).

Brookhart v. Janis, supra, p. 3, "...a denial of cross-examination without waiver...would be constitutional error of the first magnitude and no amount of showing want of prejudice would cure it."

The question of the waiver of such a right must be considered here because of the waiver on the record by Fred Smith of the appearance of counsel. This court must view the facts in transcript as showing an extraordinary happening of the day in question. Whereas, the Court would adjourn anywhere between 4:00 P.M. and not later than 5:00 P.M., the court that day decided to continue to sit until the witness' testimony was completed.

Fred Smith's waiver was given in anticipation of counsel only being absent for the morning session and not for the entire day—whether the day was extended or not. Counsel could not waive rights for more than Fred Smith understood nor could the court accept counsel's waiver of Fred Smith's rights for more than Fred Smith intended to waive. Brookhart v. Janis, supra.

"To preserve the protection of the Bill of Rights for hard pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights."

Glasser v. U.S., 315 U.S. 60 (1942).

Fred Smith was also deprived of a fair trial by the attempts of the prosecutor to introduce evidence against Alfred Smith, a defendant severed from this trial and the brother of Fred Smith. While the prosecutor was trying to submit these facts connected to Alfred Smith on the theory of acts of other coconspriators, the probative value of such evidence could not outweigh the prejudice to Fred Smith, and it amounted to a denial of due process by confusing the issues and preventing his trial from being determined on an individual basis. The prosecution maynot try to get an advantage to secure a conviction; as a servant of the law he has a two-fold aim, that guilt shall not escape nor innocence suffer. Singer v. U.S., 380 U.S. 24 1965; U.S. v. Zborowski, 271 F. 2d. 661 (2d. Cir. 1960).

Further, there was no independent evidence that Alfred Smith was a conspirator but only hearsay from the witness stand and the prosecutor's statements that Alfred Smith was a conspirator. See also Glasser v.

U.S. 315 U.S. 60 74. 75, U.S. v. Bentvena, 319 F.

2d. 916 (2d. Cir. 1963).

For these reasons, petitioner requests a reversal.

### POINT V

THE PETITIONER ALBERT GRASSO WAS DENIED THE PROTECTION GRANTED HIM UNDER THE 5TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND BY 18 U.S.C. SEC. 3481 TO REMAIN SILENT AT THE TRIAL.

Mr. Ritchie in his summation made reference to an outburst by Mr. Grasso during the trial, in that Mr. Grasso called the witness, Johnny Valentine, a liar as to certain events as to which Valentine had testified. Valentine has said that Grasso had "blown the whistle on Valentine to John Macchirole about Valentine having stolen 27 cases oflobster tails."

The Prosecutor's words which were strenously objected to were:

"...Mr. Grasso, if you recall, made a statement at that time, he didn't dispute the meeting in Andy's Bar, he didn't dispute the \$100.00, the only thing he disputed was whether John Macchirole throttled Johnny Valentine and I submit that that is very powerful corroboration of Johnny Valentine". (Transcript, p.4907)

The inference is obvious as was promptly indicated by counsel, i.e., Mr. Grasso should have refuted all of Valentine's testimony and that by keeping silent as to the other points he was corroborating Johnny Valentine.

The only way Mr. Grasso could have disputed Mr. Valentine was by taking the witness stand himself or have resisted the efforts to calm him down and whereupon the Court

would have acted.

The trial judge was correct in admonishing the jury that the prosecutor should not state or try to make such an inference for the jury from a failure of a defendant to testify but as was requested by counsel a mistrial should have been declared. Griffin v. State of California, 380 U.S. 604 (1965); Wilson v. U.S. 149 U.S. 60; 18 U.S.C. 3481. Appendix S-3. No curative instruction could have removed that inference from the mind of the jury that Mr. Grasso's silence on these points raised by the prosecutor, was indeed indicative of his guilt of having stolen 10-50 lbs. cases of frozen seafood and of having put them into the trunk of either his Thunderbird or Cadillac (the latter having had special significance to the prosecutor's case).

This was not a case of fair and/or vigorous comment as in <u>U.S. v. Wilson</u>, 500 F. 2d. 715 (5th Cir. 1974), but as a highly improper comment and was far too misleading as to what, if anything, it corroborated. As was succinctly and correctly said by the Court in <u>Brett v. State</u>, 301 So. 2d. 151 (Fla. App. 1974):

"A prosecutor may not directly or indirectly comment on a defendant's failure to take the stand."

That this was an intentional effort can be seen from the fact of the prosecutor's return to this theme only a few moments later. (Transcript, p. 4925).

This closing argument affected substantial rights,

Johnson v. Wyrich, 381 F. Supp. 747 (D.C., Mo. 1974),

and was calculated and was so prejudicial that even sustaining an objection was insufficient. <u>U.S. v. Haynes</u>,

466 F. 2d. 1260 (5th Cir. 1972); <u>U.S. ex rel D'Ambrosio v.</u>

Fay, 349 F.2d. 957 (2d Cir. 1965) cert. denied 382 U.S.

921.

#### POINT VI

ALL THE PETIONEERS WERE DENIED A FAIR AND IMPARTIAL TRIAL GUARANTEED TO THEM BY THE SIXTH AMENDMENT BY VARIOUS AND SUNDRY ACTS OF PROSECUTORIAL MISCONDUCT.

The promary concern of any court is the fairness of the procedure. Incidents of prosecutorial misconduct, which either in their own right or cummulatively create a prejudice which inures to the defendants, call for a reversal. Frazier v. Cupp 394 U.S. 371 (1969).

The various acts complained of ran throughout the trial and reached the zenith during summation.

As was already indicated above, one incedent concerned itself with improper comment upon a defendant's not taking the witness stand.

Another was early in the summation when the prosecutor tried to raise inferences from the tallies which were excluded from evidence and after express instructions and agreement not to so comment. Appendix pages T-18 through T-21. This was followed by a return to the same theme only moments later. Appendix pages T-22 through T-27. His argument was to the effect that if you compare an item which is in evidence with an item which is not in evidence, you will see the proof of a theft. This again was unfair comment that could do nothing more than to prejudice

the jury by showing that the prosecutor was in possession of facts which the jury could not have and upon which he based his opinion of the defendant's and in particular Mr. Grasso's quilt. That only Raymond Coughlin was found guilty of the substantive count of violation of 18 USCs section 659 does not end the inquiry as to the effect on the jury's deliberation to find a conspiracy because of the information withheld from the jury and which the prosecutor was trying to get to them.

Such assertions from matters stricken from the record are not proper and were made repeatedly and without provocation and intended to mislead the jury. U.S. v. Gonzalez, 488 F. 2d 833 (2d. Cir. 1973); U.S. v. Terrell 474 F. 2d 872 (2d. Cir. 1973).

The prosecutor continuously attempted to have the jury make inferences from facts unsupported by the record. Appendix page T-28. Where in he was attempting to assert that while there was no testimony that Carmine Piccora received anything from Whitey the basic thruth was that someone else paid him.

Next the prosecutor refered to the reason why Anthony Berrcivenga left work at Frigid Express-which was objected to as not only an improper inference but as untrath. Appendex page T-29. The truth as elicited on cross examination from Anthony

Bencivenga was that he was fired for stealing. Appendix T-30.

Mr. Ritchie continued to press on the jury inferences to be made from facts again not in evidence, i.e. conversations between a defendant and his father.

Appendix pages T-31 through T-32.

When a prosecutor makes continued references to make facts not in evidence to show quilt it is exactly the type of situation which would require a per se reversal of conviction. U.S. v. Somers, 496 F. 2d. 723 (3d. Cir. 1974) cert. denied \_\_\_, U.S. \_\_\_.

The Prosecutor has a duty not to mislead or make affirmative statements contrary to what is known to be the truth. U.S. v. Universita, 298 F. 2d. 365 (2d. Cir. 1962), cert. denied 370 U.S. 950. Nor should summation be used to put before the jury facts not in evidence, U.S. v. Spangelet 258 F. 2d. 338 (2d. Cir. 1958). The prosecutor represents a "soverighty whose obligation is to govern impartially," Berger v. U.S. 25 U.S. 78, 88 (1935), and his position would lead a jury to put more confidence in him than in the ordinary member of the bar.

The prosecutor next referred to the credibility of his witness in such a manner as to lead the jury from those witnesses' self-admitted quilt to the quilt of the defendants.

He started at appendix pages T-33 and T-34. Objections were sustained, the jury advised and the prosecutor admonished. Undaunted, he returned to the method of making inferences by referring to the fact that one of the government witnesses was a heroine addict at the time he was a helper at Frigid Express. The implication he drew was that because his presence was tolerated his associates were "with him in the theiving". Appendix page T-35.

This studied effort to get a point across leaves room for doubt as to the bona fides of Mr. Ritchie's assertion of his intent to say witnesses, instead of defendants when he was referring to the "important question of the background of the defendants", but a few moments before. Appendix page T-36. The trial court could not cure this parting "misconduct" by telling the jury to disregard it again. A person may be found guilty of an offense because he committed it but not because he is a "bad man". State v. Johnson 222 N.W. 2d. 483 (Iowa, 1974).

Nor should a prosecutor bolster the government's case by placing the prestige of the United States behind its witnesses as was implicit in this effort, U.S. v. La Sorsa 480 F. 2d. 522 (2d. Cir. 1973) Cert. denied 414 U.S. 855; U.S. v. Gonzalez, supra. It is

an axiomatic principle of law that it is highly improper for a prosecutor to unjustifiably resort to argument which tends to arouse passion, hatred, scorn or resentment against the accused in the minds of the jurors, and statements or insinuations made by prosecuting attorneys, statements to the character, conduct, habits or associations of an accused, which were calculated to arouse prejudice is that sort of prosecutorial misconduct which can deprive the accused of a fair and impartial trial as guaranteed by the Sixth Amendment to the United States Constitution. U.S. v. Socony-Vacuum Oil Co. 310 U.S. 150 (1940) rehearing denied 310 U.S. 658.

During the course of the trial itself several incidents of misconduct are apparent of which only the most glaring of this course of conduct aimed at influencing the jury at the expense of substantive rights is discussed.

At one point in the trial when the prosecutor was explaining how he wanted a witness to identify a regiscope photo of the defendant Fred Smith, an objection was interposed as to whether the witness knew the person in the photo. Mr. Ritchie started screaming, "I know who it is". Appendix pages T-37, T-38. [The photo was in fact one of Alfred Smith]

Mr. Ritchie again drew on his well of personal

knowledge, constantly implying names to witnesses, an example of which is in the appendix T-39, T-40. When the witness Valentine testified he could not remember the last name of someone called "White Fredie" and after defense counsel clarified that such person was not in the courtroom, the prosecutor gratuitously gave the full name of said person.

A prosecutor may not use his own personal knowledge. He must elicit the evidence and only from such matter may the jury make inferences. He may use only legitimate means, Berger v. U.S. Supra.

Another incident involved the redirect testimony of Keith Lofton. Appendix page T-41. That Mr. Lofton had in cross examination made a gratuitous reference of fear for his safety while at the Grand Jury, which the cross examiner effectively cured, does not give the prosecutor carte blanche to open an area so prejudicial and with only one possible effect, i.e., gaining the advantage to secure a conviction. U.S. v. Zborowski, supra.

In response to statements being made by the prosecutor to the handwriting expert, defense counsel objected. The court attempted to explain to the prosecutor the basis for sustaining the objection. The prosecutor took exception to the court's innocent analogy and made a calculated plea to the sympathy of

all present, which elicited a return comment. Then Mr. Ritchie said: "I am a young lawyer trying my best, your Honor." Appendix pages T-42, T-43.

Motion for a mistrial was denied but the court was not unmindful of the deliberateness of the prosecutpr/ Appendix page T-43. Nor would the court accept an explanation-- "you didn't have to answer..."

Appendix page T-44.

In a situation where similar words were used in conjunction with partisan conduct toward the prosecutor by a trial judge, this Court held that the result was so prejudicial as to deprive the accused of a fair trial.

U.S. v. Guglielmini, 384 F. 2d. 602, (2d. Cir. 1967).

Granting the difference between the speaker in this case and the Guglielmini case, this is a more prejudicial situation, when viewed in light of all the conduct listed above, and below. In criminal casis, when the misconduct of the prosecutor is so gross and persistent, a mistrial is called for or reversal of a conviction on appeal—especially when the case is weak because it accentuates the probability of prejudice to the accused.

Berger v. U.S. supra, page 84.

Prejudice invered to these defendants by the synergistic effects of the time limitations in the de-

this appeal.

In another incident the prosecutor was determined to prevent any possible exculpatory matter from being elicited on cross examination of one of the governments witnesses. Appendix pages T-46, -47, -48.

Disclosure rather than suppression promotes
the proper administration of criminal justice and it
is far better to have the truth rather than a conviction. <u>U.S. v. Baum</u> 482 F. 2d 1325 (2d. Cir. 1973);
U.S. v. Deutsch, 373 F. Supp. 789 (D.C. N.Y. 1974).

At virtually the closing moments of the governments case, the prosecutor revealed exculpatory material to the defense. One such revelation included a statement by one Wade that a meeting testified to by John Valentine, a government witness, at which wade and certain defendants were to have attended, did not occur. Appendix page T-49. A subpoena was immediately delivered to the U.S. Marshall for services on Wade. By the time the government was to rest wade could not be served. Mr. Ritchie had knowledge of the statement when the relevant testimony was being elicited. He made no disclosure and as an advocate pressed his advantage to the hilt. Appendix page 50.

Evidence in the government's possession and favorable to the defendants must be given far enough in advance to allow sufficient time for its evaluation and/or use and should not be held to obtain an advantage. Such conduct is irreconcilable with a fair trial. U.S.

v. Brawer, 496 F. 2d 703 (2d. Cir. 1974); Christman

v. Hanrahan 500 F. 2d 65 (7th Cir. 1974); Corpus v.

Beteo, 469 F. 2d 953, Cert. denied 414 U.S. 932;

U.S. v. Zboroswki, supra; U.S. v. Deutsch, supra.

The final examples of misconduct involve repeated incidents of the prosecutor continuing to argue, disagree or demean the court in attempts to get his own way after the court made a ruling. The effect of such conduct is to impress on the jury that this one lone voice against five opponents and the judge has the information the jury ought to have and is being prevented from having, by an improper combination of th the judge, points of law and the opponents, rather than the realities of the situation, i.e. one man who can command all the resources of the United States Government to aid him. See appendix pages T-51, -52, -53, -54. A mistrial was requested because of this conduct and the prosecutor's demeanor and it was denied. Appendex T-55. The court at one point threatined the prosecutor with contempt. Appendix page T-56.

The right of counsel is to press an issue and to obtain the court's considered ruling. But if the ruling is adverse to counsel, counsel's right is only

v. U.S. 343 U.S. 1 (1952) rehearing denied, 343 U.S.

931. Persistance after an adverse ruling is prejudicial
U.S. v. Patterson 495 F. 2d. 107 (D.C. Cir. 1974).

Other instances of misconduct include disregard of the court's instructions as with the references to matters not in evidence, during summation, above, and appendix pages T-57, -58; explaining witnesses testimony. Appendix pages T-59 to T-60, and many other incidents.

For these reasons petitioneers were denied a fair and impartial trial.

### POINT VII

THERE WERE SEVERAL ERRORS ATTENDANT ON THE TRIAL COURT'S CHARGE TO THE JURY

A. It was error to preclude defense counsel from making additional objections to the court's charge to the jury prior to the jury's withdrawal for deliberations and to refuse to charge as per defendant's request which constitutes a denial of a fair trial and is "plain error."

Prior to closing arguments and instruction to the jury the parties had make a record with respect to the instructions which the Court indicated it would give. After argument and instruction but prior to the jury's withdrawal the defense counsel attempted to make further objections at a side bar, and the trial court precluded him from doing so. Appendix pages T-62, -63, -64, -65. Written objections were submitted and further objections were not orally made prior to the charge.

Because of the tyranny of Federal Rules of

Criminal Procedure Rule 30, 18 USC. Appendix

page S-4, unless an objection is made it is

forever waived. Here is was obvious that the court

never saw the written objection. Counsel was

caught between the proverbial "rock and a hard

place," and he acted. The district court judge

should have entertained his objections. Hamling v.

U.S. \_\_\_, 41 L. Ed. 2d. 590, rehearing

denied \_\_\_U.S. \_\_\_.

This was not only error but reversable error because the defendants wereprecluded from having their position clearly presented. U.S. v. Fernandez 456 F. 2d. 638 (2d. Cir. 1972); U.S. v. Titus 221 F. 2d. 571 (2d. Cir. 1955) Cert. denied 350 U.S. 832. There was no attempt to give the appearance of antagonism between defense counsel and the trial judge. Certain matters had to be straitened out especially when the court charged that the jury was "to determine the guilt or innocence of the defendants." Appendix page 62. That this is not the function of a jury is obvious and without such an instruction there may well have been a contrary verdict. A charge on reasonable doubt is vitiated when the choice given is guilty beyond a reasonable doubt and innocent; rather than guilty beyond a reasonable doubt or not guilty because of a reasonable doubt. Appendix page 67.

Also in a situation where there was a de facto time limit on deliberations, the charge to the jury that there must be a unanimous verdict is fraught with coercion. Appendix page 67, Couple this with the failure to charge over objection the entire Defendants Request for Charge #37, Appendix

page 68, to the effect that unanimity is not in and of itself the purpose of the jury's deliberations. The failure to bring home to the jurors their right to not reach a unanimous verdict, deprived these defendants of their substantive rights.

B. The court charged the jury improperly on the law as to the use of hearsay utterances.

He charged that:

"Hearsay utterances may be considered along with all the other evidence in determining whether you are convinced of the individual defendant's guilt beyond a reasonable doubt.". Transcript page 4956.

This was part of a charge as to co-conspirators and was not limited as was the charge in reference toacts, declarations or statements of co-defendants. The impression being that the hearsay utterances of the government's witnesses carried more weight than even the accepted exceptions to the Hearsay Rule. Appendix pages T-69, T-70. The trial judge did not sufficiently make clear to the jury that

"Such declarations are admissible...only if there is proof aliunde that he is connected with the conspiracy...Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence."

Glasser v. U.S. supra, pages 74-75. See also, U.S. v. Geaney 417 F. 2d. 1116 (2d. Cir.

1969). At the very least this instruction caused confusion as to the proper method of proof of an individual's connection with the alleged conspiracy.

Nor was the jury charged that there must be substantial and not just slight evidence that an individual was a member of a conspiracy before even considering whether the defendant was a member beyond a reasonable doubt. <u>U.S. v. Bentvena</u>, supra; <u>U.S. v. Consolidated Laundries Corp.</u>, 291

F. 2d. 563 (2d. Cir. 1961). <u>U.S. v. Stromberg</u>, 268 F. 2d. 256 (2d. Cir. 1959).

Petitioneer urge that for the above reasons they were deprived of making their positions clear to the jury, or that these reasons constitute plain error of such magnitude for this court to take cognizance of them either individually or collectively under Rule 57 (b) of the Federal Rules of Criminal Procedure, 18 USC.

# POINT VIII

THE EVIDENCE TAKEN AS A WHOLE WAS INSUFFICIENT TO ESTABLISH ANY AGREEMENT EITHER EXPRESS OR IMPLIED THAT WAS ENTERED INTO BY EACH PETITIONEER AS AN INDIVIDUAL.

Petitioners assert that not only was the evidence produced in this case utterly lacking as to the specific knowledge but that taken as a whole, and as a matter of law, it was insufficient to establish any agreement either express or implied entered into by each of them as individuals. And that they are the victims of the prosecutor's dragnet, convicted only because of association at the place of employment, and without proof of intentional participation "with a view to the further-ance of common design and purpose." U.S. v. Bostic, 480 F. 2d. 96, 598 (6th Cir. 1973).

Learned Hand in <u>U.S. v. Falcone</u>, 109 F. 2d 579, 581 (2d. Cir. 1939), affirmed 311 U.S. 205. cautioned... "so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders.

That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided."

Because most conspiracies are covert, prosecutors can seldom prove its existence directly and the courts have overcompensated for this. Developments in the Law; supra, at page 984 and allow the prosecutor to rely on "inferences drawn from the course of conduct of the alleged conspirators", Interstate Circuit v. U.S. 306 U.S. 208 (1939) at 221, and have neglected the fundamental requirement of requiring the agreement to be proved, i.e., the act. Cousen, Agreement as an Element of Conspiracy, 23 Va. L. Rev. 989 (1937).

As is readily apparent from the instant case such an agreement was inferred from the mere unifor formity of actions by unknown parties on four days in the summer of 1972, for which the petitioners were found to have agreed to do those acts. Presumptions of guilt of conspiracy should not lightly be indulged in from mere meetings. <u>U.S.v. Di Re</u> 332 U.S. 581 (1948). This cannot be permitted under the guise of facilitating the prosecutor's burden. <u>U.S. v. Armour and Co.</u>, 48 F. Supp. 801 (D. C. O.K. 1943) rev'd on other grounds 137 F. 2d. 269.

To sustain a conspiracy conviction the evidence when viewed in its entirety must generate more than mere suspicion of guilt. U.S. v. Buller,

494 F. 2d. 1246 (10th Cir. 1974). Mere association even with knowledge of illegal activities is insufficient. U.S. v. Webb 359 F. 2d 558, 562 (5th Cir. 1966).

In the instant case where one continuing conspiracy is speciffically charged proof of different ones will not sustain the conviction. U.S. v. Bostic, supra.

For these reasons Petitioneer's seek a reversal of their convictions.

## POINT IX

PETITIONERS' RIGHTS OF DUE PROCESS AND FUNDAMENTAL FAIRNESS WERE VIOLATED IN OBTAINING THEIR INDICTMENT AND IN THEIR TRIAL.

Petitioners wish to place before this Court an item of great significance to our Constitutional system and the freedom of each and every individual citizen, whether this Court chooses to consider it has having any bearing on the instant case or not. Because petitioners obviously cannot prove that other statements have been similarly affected, Albert Grasso, Fred Smith, Charles Green and their counsel pray that some comment be issued by this Court no matter what the outcome of this appeal is in order to prevent such further abuse.

On cross-examination of Phillip R. Dawson (transcript p. 394), he was asked if a statement was prepared by Government agents for him to sign, and if he had to make corrections. (Page 394 - line 21).

- "Q. ...I am asking you again when the agents wrote out a statement and they showed it to you, that you then struck out whole names;
- A. Yes,
- Q. Because you hadn't given those names to the agents, had you? That is why you struck

them out.

### A. Yes."

This witness caught the deception before "his" statement was used to refresh "his memory" prior to a Grand Jury appearance. How many of these petitioners, and others similarly situated, were inculpated by such testimonial evidence?

This is a travesty on the Bill of Rights which cries out for correction. This taken together with the obvious pressures put on government witnesses to first become a witness and then during the course of trial, having had defense material withheld until the eleventh hour discussed supra, and other instances of governmental imposition on these petitioners, leaves little room for doubt that they were improperly tried, all to the violation of petitioners' substantial rights.

# CONCLUSION

Based on the reasons herein stated, it is respectfully sumitted that the judgement heretofore imposed upon petitioneers by the U.S. District Court for the Eastern District of New York, be reversed.

Respectfully submitted,

Vincent L. Verdiramo, Counsel for Appellants UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
THE UNITED STATES,

Plaintiff,

-against-

AFFIDAVIT

CARMINE PICCORA, RAYMOND COUGHLIN, NEIL PACILIO, ALBERT GRASSO, CHARLES GREENE and FRED SMITH,

Defendants.

STATE OF NEW YORK)
COUNTY OF NASSAU ) ss:

ANTHONY CANEGALLO, being duly sworn, deposes and says:

That I reside at 261 Oceanside Street, Islip Terrace, New York, and that I was a duly sworn juror serving on a jury of twelve in the above captioned case. I was empaneled and served as a juror for the entire trial and participated in the jury's deliberations and its verdicts which was rendered on July 23, 1974, at about 9:20 p.m

During the trial, jurors five and eleven made known to the Court that they had vacation plans to leave the country on July 24, 1974 and were assured by the Court that they would not serve beyond July 23, 1974.

The jury's deliberations began on July 23, 1974 at about 12:40 p.m. Both jurors five and eleven made it quite

clear to all other jurors that no matter what occurred, they would be leaving on their vacations to Canada on the morning of July 24, 1974.

After one poll of the jury, there were eight jurors in favor of acquittal of all defendants with the exception that I felt defendant RAYMOND COUGHLIN was guilty of the charge of conspiracy and there were four jurors in favor of conviction of all the defendants on all counts.

Thereafter another vote was taken and now ten jurors were in favor of acquittal of all defendance and two jurors (jurors two and twelve) were firmly holding out for conviction of all defendants on all counts.

After much discussion, jurors two and twelve would not change their firm position of guilty on all counts.

Considering the above, and the time was approximately 7:30 p.m., I thought that further discussion was useless and on three separate occasions I told the jury foreman that the jury should report to Judge Costantino that the jury was a hung jury and hopelessly deadlocked.

At this point, juror twelve said that if we so informed the Judge that he could possibly order us back to deliberate for six more hours and may even order us to stay overnight. When jurors five and eleven heard this, they immediately protested to the other jurors.

eleven again stated that they had to leave this evening as their planned vacations were to start the very next day. Juror twelve then remarked that he did not care if the jury's deliberations lasted another month as he had no plans. Therefore, the fact that jurors five and eleven had to leave that evening; the firm stand of jurors two and twelve for conviction of all defendants; the fact that all jurors except myself were against informing the Judge that we were deemed locked and seeing that we did not have ample time to freely deliberate, the ten jurors for acquittal of all defendants except defendant COUGHLIN sought and finally reached a compromise verdict with jurors two and twelve at 9:30 p.m. If there had not been a pressing time limit for deliberations, I would have held out for a hung jury but due to the facts stated I did not do so. When I was polled as a juror, I wanted to say that it was not my verdict but because of the circumstances related above I acted otherwise. Sworn to before me this 15th day of November 1974 ANTHONY N. DEL ROSSO Qualified in Nassau County

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

THE UNITED STATES

73-CR-827

v.

MEMORANDUM and ORDER

CARMINE PICCORA, RAYMOND COUGHLIN, NEIL PACILIO, ALBERT GRASSO, CHARLES GREENE and FRED SMITH,

DEC 27 1974

Defendants.

Appearances:

David G. Trager, United States Attorney, E.D.N.Y., by David J. Ritchie, Special Attorney

Anthony N. DelRosso, 1055 Franklin Avenue, Garden City, New York 11530, for defendant Piccora and on behalf of defendants Coughlin, Pacilio, Grasso, Greene and Smith

Seymour Margoulies, 921 Bergen Avenue, Jersey City, New Jersey, for defendant Pacilio

Vincent L. Verdiramo, 3163 Kennedy Boulevard, Jersey City, New Jersey, for defendants Greene, Smith and Grasso

Krivit, Levitov, Miller, Galdieri & DeLuca, 40 Journal Square, Jersey City, New Jersey, for defendant Coughlin

COSTANTINO, D.J.

3-17-72—30M—9153

Relief

Proh FRCP Rule3 Rule3 of the Federal Rules of Criminal Procedure setting aside the verdict of guilty and entering a judgment of acquittal or, in the alternative, for an order pursuant to Rule 33 (2) granting a new trial. This court on November 15, 1974 found no merit to most of the grounds given in support of the motion but reserved decision on the motion in order to give further consideration to questions relating to the alleged coercion of jurors.

In this court's opinion, two questions are raised:

1. Whether the motion should be granted because the court received an affidavit in support of defendants' motion from one juror stating that the juror agreed to a compromise verdict instead of holding out for a hung jury because of the vacation plans of two jurors.

2. Whether statements made by the court to several jurors as to when the case would be concluded require granting the motion.

Affidavit Alleging Compromise Verdict

The affidavit of one juror, Mr. Anthony Canegallo,

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jury were it not for the fact that continued deliberation would have interfered with the vacation plans of two of his fellow jurors. During the trial, three jurors indicated their plans to leave on vacation trips during the third and fourth weeks of July and were assured by the court that the case would be completed by July 24. The jury began its deliberation on July 23, 1974 at about 12:40 p.m. and rendered a verdict the same day at about 9:20 p.m.

Should a jury verdict be set aside where an affidavit of one juror states that an outside influence—the racation plans of other jurors—led the affiant to agree to a compromise verdict?) The general rule is that jurors "are allowed to testify only as to the nature of outside influences, but not as to the subjective effect of the intrusions upon their mental processes." United States

v. Kohne, 358 F. Supp. 1046, 1050 (W.D. Pa. 1973), aff'd

485 F.2d 682 (3d Cir. 1973), 487 F.2d 1395 (3d Cir. 1973),

cert. denied, 42 U.S.L.W. 3653 (May 28, 1974); see Mattox

v. United States 146 U.S. 140, 149 (1892); United States

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v. Reed, 313 F. Supp. 451, 454 (D. Conn. 1970), aff'd 437 F.2d 57 (2d Cir. 1971), 439 F.2d 1 (2d Cir. 1971); The Proposed Rules of Evidence for United States District Courts and Magistrates, Rule 606(b). (Some of the policy considerations supporting the rule were expressed in Mattox v. United States, 146 U.S. at 148, which quoted Perry v. Bailey, 12 Kan. 539, 545:

Public policy forbids that a matter resting in the personal consciousness of one junctions be received. Public policy forbids that a consciousness of one juror should be received to overthrow the verdict, because being personal it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the expressed conclusions of twelve; its tendency is to produce bad faith on the part of a minority, to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict.

Other policy considerations underlying the rule were set forth in McDonald v. Pless, 238 U.S. 264, 267-68 (1914):

> [L] et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might

invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

under the general rule given above, this court must refuse to consider the affiant's statement as to the effects which an outside influence had upon his thought processes. But this court is mindful of the warning given in McDonald v. Pless, 238 U.S. 264, 268-69 (1915) and United States v. Grieco, 261 F.2d 414, 415 (2d Cir. 1958) that it would not be safe to lay down any inflexible rule because there might be instances in which the testimony of the juror could not be excluded without violating the plainest principles of justice. (Here, however, the court finds that the principles of justice are not violated by failure to grant the motion on the basis of the affidavit. The jurors were advised during the voir dire of the right of an individual juror

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during deliberations to hold firmly to his position if convinced of its correctness even if he is in the minority:

The Court: Let's assume, sir, that you're sitting in the jury room, deliberating, and you have come to a conclusion and you feel that you're absolutely right in your conclusions. . . You weigh all the testimony. Your determination you feel is right, after hearing all the evidence. Would you abdicate your position or stick with it?

Juror No. 1: Stick with it. (Transcript of Voir Dire at 84)

The foregoing dialogue is relevant to Mr. Canegallo since all prospective jurors were advised to listen to all questions posed by the court during the voir dire (Transcript of Voir Dire at 81). Indeed, immediately after Mr. Canegallo was selected as an alternate juror (he later was selected as a regular), the court expressed once again its concern that prospective jurors listen to all questions posed during the voir dire (Transcript of Voir Dire at 148). In addition, the court charged the jury that it was its duty to base the verdict solely on the evidence: "Keep constantly in mind that it would be a violation of your sworn duty to base a verdict of

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guilty upon anything other than the evidence in the case"
(Transcript of Trial at 4967). Under the circumstances,
the court finds no reason for departing from the general
rule given above. (Accordingly, the motion will not be
granted on the basis of the assertions contained in Mr.
Canegallo's affidavit.)

# Assurances to Several Jurors

(The second question is whether the motion must be granted because of statements made by the court to several jurors as to when the case would be concluded.) In <u>United States v. Miller</u>, 478 F.2d 1315, 1320 (2d Cir. 1973), <u>cert. denied</u>, 414 U.S. 830(1973), the court indicated that the statements of trial judges to jurors must be "read in context" to determine whether they were coercive. Consequently, some background information is necessary.

In the case at bar, the court was faced with the difficult problem of the trial lasting far longer than originally anticipated. Although the government originally estimated that presentation of its case would require three to four weeks (with five weeks as an outside

limit, Trial Transcript at 3950), its presentation actually lasted ten weeks. The government and defense counsel share responsibility for the unexpected length of the trial. Several weeks before the trial ended, the court was informed that several jurors had plans to leave for vacation in July. Consequently, the court repeatedly attempted to have counsel proceed as quickly as possible to avoid conflict between orderly presentation of the case and the vacation plans of the jurors. On July 15, the court questioned three jurors, numbers 5, 8 and 11, and assured them that the case would proceed quickly and that the jurors would be free to leave by July 24 (Trial Transcript at 3952-55).

Defendants contend that their motion should be granted because of these assurances to the jurors. (The issue of whether a trial judge coerced a jury ordinarily arises in the context of an improper jury charge immediately prior to, or in the midst of deliberations;)

e.g., United States v. Tyers, 487 F.2d 828 (2d Cir. 1973)

Onited States v. Jennings, 471 T.2d 1310 (2d Cir. 1973),

cert. denied 411 U.S. 935 (1973); United States v. Cassino,

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467 F.2d 610, 619 (2d Cir. 1972); cert. denied 410 U.S. 928 (1973). This was not the case here.

After careful consideration of the record and relevant case law, the court concludes that its assurances to the jurors were not coercive or prejudicial. The instructions given the jury in the charge and statements made by the court during the voir dire were sufficient, in this court's judgment, to apprise the jury that a guilty verdict was to be returned solely on the basis of the evidence presented. The jury process "depends on the assumption that the jurors will follow the instructions given by the judge, United States v. Bell, Docket No. 74-1391 (2d Cir., filed July 17, 1974). (At no point did the court interfere with the deliberations; more specifically, the court did not suggest that the deliberations should proceed quickly in view of several jurors' vacation plans. Although it is "not possible to determine mental processes of jurors by the strict tests available in an experiment in physics," United States v. Grieco, 261 F.2d at 415-16, this court is satisfied

that the jurors were not coerced into rendering the verdict. The motion is, accordingly, denied.

U. S. D. J.

18 USC Sec. 659:

Whoever embezzles, steals, or unlawfully takes, carries away, or conceales, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storag- facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal of air navigation facility with intent to convert to his own use any goods of chattels moving as or which are a part of or which constitute an interstate or foreign shipnent of freight, express or other property; ... to establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made. The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property.

New York CPLR Sec. 4504:

(a) Confidential information privileged. Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing or dentistry shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. The relationship of a physician and patient shall exist between a medical corporation, as defined in article forty-four of the public health law, a professional service corporation organized under article fifteen of the business corporation law to practice medicine, and the patients to whom the respectively render professional medical services...

18 USC Sec. 3481:

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make sich request shall not create any presumption against him.

FEDERAL RULES OF CRIMINAL PROCEDURE RULE 30, 18 U.S.C.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

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(The following occurred out of the hearing of the jury.)

(Question of the witness continued.)

### BY MR. VERDIRAMO:

THE COURT: What is his doctor's full name?

MR. VERDIRAMO: Dr. Davis.

THE WITNESS: I went to an analyst once.

THE COURT: You say you went to an analyst.

You went to him for what, for treatment?

THE WITNESS: No, I went once to him.

THE COURT: For consultation?

THE WITNESS: Yes.

THE COURT: This was your personal doctor?

THE WITNESS: N o, it wasn't my doctor. I

was sent to him.

THE COURT: You went to him?

THE WITNESS: Yes.

THE COURT: For yourself?

THE WITNESS: Yes.

THE COURT: I tell you now that you need not answer any of the questions involving your consultation with this doctor in reference to any of your mental attitude. You have a privilege under the law. Do you wish to waive that privilege?

# Bencivenga-Cross

THE WITNESS: I don't want to answer him.

THE COURT: He will not waive those privileges

MR. ROSEN: I ask your Honor to direct the

witness to answer the questions.

THE COURT: I will not.

MR. ROSEN: I except.

MR. VERDIRAMO: We all except.

THE COURT: If he doesn't wish to waive it,

he doesn't have to. It's strictly privilege. It

is like lawyer and client.

MR. DE LUCA: Note my exception.

THE COURT: Oh, sure.

(Continued on the next page.)

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THE COURT: Now, you three who want to be excused, may be excused with consent.

MR. RITCHIE: Yes.

MR. DEL ROSSO: Yes.

THE COURT: Now, we will proceed with no alternates.

Members of the jury, you must be here each day we proceed. If something becomes impossible, you let me know and that is no problem. The Courthouse will be here for a long time but we cannot suspend and start all over again.

You will take seats seven, eight and nine.
MR. ROSEN: Exception for the record.

THE COURT: Do any of you outside -- now,
outside of number seven, is there anyone who feels
he may have a problem in getting here? I know
Juror Number Seven has a problem with the Long Island
Railroad but that doesn't bother me. Is there anyone
else who thinks he or she may have a problem?

Is there anything that you so wish to pass on
to the Court that may keep you out of the courthouse?

Of course, I am not speaking of anything unforeseeable.

So, outside of the good Lord doing what he plans on
doing -- we cannot foresee that -- we will proceed
with the 12 jurors who will now, please rise.

MP f123

that side of the case goes quite rapidly.

If we didn't finish on Friday, more than likely we would finish by Monday or Tuesday of the following week. You will give me until Tuesday?

JUROR NO. 5: Yes.

THE COURT: How does that sound?

MR. RITCHIE: That is fine with me, Judge.

MR. ROSEN: That is very fair, Judge.

THE COURT: That is my promise to you. If

it's not, you are going to be leaving - Tuesday will

be the last day you are here. You will be leaving on

Wednesday, I make that promise to you.

JUROR NO. 5: All right, fine. That would be wonderful.

THE COURT: All right.

(Juror excused.)

THE COURT: We have another juror who wants to leave.

THE CLERK: I think it is Juror No. 9, Judge. Either 9 or 10.

(Continued next page.)

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(Juror No. 11 is in the courtroom.)

THE COURT: You say you are leaving on Friday?

JUROR NO. 11: Not Friday. I am supposed to go

THE COURT: We are trying to work out a schedule.

We are not doing too well but we are doing somewhat

better. We hope to have the case, the Government's

case, finished sometime early this week and the

defendant's case started. I told the other juror --

JUROR NO. 11: Helen?

JUROR NO. 11:

on vacation next week.

THE COURT: Yes. That I promised her by Tuesday
the case would be over and they would be out of here
by Wednesday next week. Is that all right with you,
too?

JUROR NO. 11: That will be okay.

THE COURT: Does anybody else have a problem?

THE COURT: We will leave it as we have it. We will speed it up.

Tony.

(Juror No. 11 left the courtroom.)

MR. RITCHIE: Can we speak to the other juror?

MR. VERDIRAMO: Ask whoever Tony is.

THE CLERK: Juror No. 8.

THE COURT: He's been saying he wants to go for a long time. He didn't want to stay here the first day

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1	we were here. He happened to be No. 12 and he couldn't
2	help it.
3	MR. RITCHIE: We will take care of markings at
4	lunchtime. Hold me to that, okay?
5	THE CLERK: All right.
6	(The jury is in the jury box.)
7	THE COURT: Do you have any problems?
8	JUROR NO. 8: I am supposed to go Friday.
9	THE COURT: It's all right. These two weeks
10	are supposed to be my two weeks off and I am here.
11	We are ready to start. We are trying to speed it
12	up to see how fast we can go with the hope of
13	satisfying everyone.
14	MR. RITCHIE: The Government would call Rick
15	Avellanda
16	RICK AVELLANDA, called as a witness,
17	having been first duly sworn, took the stand and
18	testified as follows:
19	DIRECT EXAMINATION
	BY MR. RITCHIE:
20	Q Mr. Avellanda, what is your occupation?
21	A I am a traffic manager of L. N. White & Co.
22	Q What kind of business is L. N. White involved in?
24	A Importing and exporting.
	Q Of what goods?
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MR. RITCHIE: As I stated, I have contacted
Mr. Philip Blomberg, the attorney for Mr. Al Wade;
he stated that he can get his client here by 11:30
tomorrow. He stated he was going to call your Honor
and I expect your Honor to receive a call momentarily.

MR. ROSEN: The defense, in view of all the circumstances, is prepared to sum up tonight, have your Honor sum up tonight and let it go to the jury.

We want a verdict here. We don't want to waste 12 weeks of effort we have put in. We feel any further delay now has to be prejudicial to the defense. I don't want them picking and chosing between counts.

The danger of a compromise verdict is obvious.

THE COURT: They are back here in that room

and don't want to leave.

MR. ROSEN: The prejudice keeps growning.

Why should they say, the hell with it and go to Count

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THE COURT: What do you say the solution to my problem is?

MR. ROSEN: Have Mr. Ritchie take the stand.

If you tell me to take the stand I will take the stand.

Your Honor is the boss. That's what makes it tough some times, being a boss.

1 whether he recalls it or not. 2 MR. RITCHIE: Certainly. THE COURT: And also Mr. Bartlett --3 MR. RITCHIE: Mr. Barrett, your Honor. 4 THE COURT: Mr. Barrett will be here whether 5 he recalls it or not. 6 MR. RITCHIE: Mr. Barrett has been contacted. 7 He's not available today. 8 THE COURT: 10:00 o'clock tomorrow he'll be 9 10 here. MR. RITCHIE: He certainly will be. 11 THE COURT: He certainly will. 12 MR. ROSEN: I thought Mr. Bradley was outside. 13 Am I mistaken, Mr. Ritchie? 14 MR. RITCHIE: Absolutely, he's outside. 15 THE COURT: We will bring in Mr. Bradley. 16 MR. VERDIRAMO: Three of them this afternoon. 17 MR. PELTZ: Will the defendant be permitted 18 to attend? 19 THE COURT: Absolutely. Of course. It's his 20 hearing. 21 MR. VERDIRAMO: Your Honor, at this time I'd 22 also like to state for the record that I have been 23 subpoenaed by the New Jersey Grand Jury to appear

there tomorrow morning at 10:00 o'clock.

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Based on my prior experience with that Grand Jury, representing people there, of course, it was that I doubt very much if I'll be able to get back here at all tomorrow.

Mr. DeLuca and Mr. Margulies have consented to handle whatever --

THE COURT: 'It's all right with me.

MR. VERDIRAMO: The only problem I have is that if you do allow this defendant to testify, I think I would be somewhat derelict in a duty to my clients, in so much as I have been handling the initial cross-examination of witnesses, if this witness be allowed to testify in my absence.

For the purpose of this hearing, I think it would be of no problem at all for my defendants, but in so much as they are basically my men that he's going to go into --

THE COURT: Well, if this case doesn't go on tomorrow, it will go over until Monday because

Thursday and Friday I must try the jail case in which I have a Jury selected.

MR. VERDIRAMO: If Jasper Lester is allowed to testify, I ask that you continue this trial in my absence until Monday.

If it is too much of an imposition on the

Court then do whatever you feel is right.

THE COURT: I can't tell you whether we will start or not tomorrow.

MR. VERDIRAMO: I would like to be here when this man testifies. I understood he was going to be here today to testify, and of course we have had this imbroglio here and that's why we have had the problem.

MR. MARGULIES: May I also state for the record -THE COURT: This could have been solved yesterday if it had been shown to me.

MR. ROSEN: I saw it last night.

MR. VERDIRAMO: You were off the bench and when we got it --

MR. RITCHIE: I fully advised you yesterday concerning the Waterfront --

THE COURT: You never advised me what was done on the waiver of rights.

MR. RITCHIE: I see no problem with that whatsoever.

THE COURT: I'm glad you don't see a problem.

MR. RITCHIE: If anything, it shows an extreme

amount of protection of a defendant's rights.

THE COURT: You are reading it in the wrong sense. You should be reading it, the struck out

84 a defendant is entitled to the effective represen-2 tation of counsel. If counsel doesn't even recall--3 THE COURT: One moment. MR. DEL ROSSO: We filed a notice of appearance 5 onbehalf of a number of defendants, and it was 6 requested by the Clerk, either Verdiramo or myself. MR. VERDIRAMO: We filed it. 8 THE COURT: All right. That's all for 9 today. 10 Recess until tomorrow morning. 11 MR. VERDIRAMO: I won't be here tomorrow. 12 Do you want my defendants to waive? 13 THE COURT: Yes. Do you fellows understand Mr. Verdiramo is 14 15 not going to be here tomorrow morning? Do you 16 waive his appearance tomorrow morning? 17 (All defendants say yes.) 18 THE COURT: Mr. Margulies, and Mr. DelRosso 19 will represent you at that point. MR. RITCHIE: Can we have each defendant 20 state that he waives the appearance on the record 21 verbally? 22 THE COURT: All right; Mr. Green? 23 THE DEFENDANT GREENE: Yes. 24 THE COURT: Mr. Smith? 25

THE DEFENDANT SMITH: Yes. THE COURT: Mr. Danduono? THE DEFENDANT DANDUONO: Yes. THE COURT: Mr. Conte? THE DEFENDANT CONTE: Yes. THE COURT: Mr. Grasso? THE DEFENDANT GRASSO: Yes. (Court adjourned to Wesnesday, June 26, 1974, at 10:00 o'clock a.m.). 

THE COURT: It is still outside the scope.

MR. RITCHIE: Your Honor, that information -You know how it is phrased. This dispute between August
28 and --

MR. DE LUCA: He couldn't even remember the date at all. It was only two days ago.

THE COURT: An information or Indictment need not have an exact date. No one is bound by that.

MR. DE LUCA: I am not going into the 28th or 29th, he said he didn't remember the date. Two days ago he said the 28th or 29th.

THE COURT: I know.

MR. DE LUCA: Fantastic memory.

MR. RITCHIE: I object to Mr. De Luca's comment.

THE COURT: Strike it out.

Q Do you recall that you were indicted?

THE COURT: I just want to advise you that we are going to finish with this witness this afternoon.

MR. DE LUCA: I believe Mr. Verdiramo indicated he would want an opportunity to question him.

THE COURT: He said he would like to have been here. That's all he said. We are going to finish with him.

Q Do you recall you were indicted? You pleaded not

Carmine and --

MR. DE LUCA: And Fred --

THE COURT: He said Carmine and Frank, "Next time give it to Carmine and Frank and they will take care of it," okay.

MR. ROSEN: He said he kept giving cartons to Carmine.

THE COURT: How long is that going to take to examine him on? Are you going through Pier 11, Pier 12, Staten Island, for what?

MR. ROSEN: It's not up to me.

THE COURT: So we are going to stay here and finish with him. You don't have to go through the while ritual again because he mentions two names, it's not necessary.

MR. DEL ROSSO: During the recess, Freddie
Smith approached me and he doesn't have his lawyer
here, and he requested --

THE COURT: His name is mentioned once.

MR. DEL ROSSO: And he said after hearing this testimony, he would like for his counselor to cross-examine this witness.

Mr. Smith, are you here?

DEFENDANT FREDERICK SMITH: Yes

MR. DEL ROSSO: Did you so indicate?

DEFENDANT FREDERICK SMITH: Yes, I did.

THE COURT: His counsel should have made an effort toget here then after he finished.

MR. DEL ROSSO: As his Honor knows, Mr. Verdiramo made known to the Court where he had to be.

THE COURT: I don't know what time he got through. He might have been through at 11:00 o'clock this morning, he might have been through at 12:00 or 2:00

MR. DEL ROSSO: I know it was Trenton, your Honor, that's all I know.

THE COURT: It doesn't make a difference.

MR. DEL ROSSO: I don't want to be in a position where I am opposing or irritating the Jury, but I must say that my examination is going to take more than 10 minutes. It is a late hour and I think that we are all tired --

are now starting to impose upon my vacation which is next week, and the week after, and you are sitting on this case next week and the week after, and I am sitting tonight whether you like it or not, whether the Jury likes it or not. We are sitting tonight

Lester - cross - DeLuca

and that's the end of it.

I have been talking to you fellows for six weeks and for six weeks we have been doing the same thing, we have been asking the same questions, everybody jumping up and down. You all thought you were so smart objecting to questions that you didn't have to all day long, give us the time date and place, and now you will have it. You can do it all you want, and we will do it tonight.

Okay. Bring in the Jury.

(Jury present.)

THE COURT: We are going to sit a little later tonight. You don't mind, do you? We are trying to make up a few minutes that we lost along the line some place.

All right.

## BY MR. DE LUCA:

Mr. Lester, I asked you if you could recall how many times you sat with any agent or Mr. Ritchie or Mr. Ryan or any agent of the Government, and I think you indicated you can't recall, it may have been seven or eight times?

- A I said several times.
- Q What does several mean to you?

to her and made her swear she wouldn't talk to me.
That is the FBI.

THE COURT: I have my own problems without worrying about what is going on in the other courthouses.

MR. VERDIRAMO: At this point I am wondering

-- and I mean this sincerely -- I am not looking for
a mistrial because another trial might kill us all -but I don't know if my defendants are honestly and
truly getting the benefit of counsel at this point.
I don't think so. Many times I am asleep at the
switch because I am trying to find out what sort of
defense I am going to --

MR. RITCHIE: Your Honor we have adjourned the subpoenas in Newark --

THE COURT: You can't adjourn the others?

MR. RITCHIE: I will inform Mr. McGuire of your Honor's concern.

THE COURT: It is causing certain problems.

It is causing problems in my trial and I don't care what is happening in New Jersey. It is causing problems in this trial.

MR. VERDIRAMO: All the subpoenas for July 11th should be cancelled.

MR. RITCHIE: I can't speak for Mr. Cranwell

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MM 25 on the rules of evidence.

When you retire to the jury room you will be able to see certain of the tallies where the government established through the testimony of the man who wrote the tally or through the handwriting expert that a particular tally was altered by a particular individual and then you can see those tallies.

The remaining tallies, where there is additional writings, there is no proof of who entered the additional writing so you won't be able to see those but you heard Mr. Verdiramo, in his summation, say, "We don't doubt thefts or altered tallies."

Do you have any doubt the rest of the tallies were altered? If you do, you can have the rest of the tallies read and compare that with the drivers' pages in evidence.

Now, focusing on the documentary evidence, let's see what it reveals.

Number 1, that there were indeed thefts on August 1st, 14th, 23rd and September 22nd. These were paper thefts. With the flick of a pen, all of a sudden --

(Continued next page.)

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MR. MARGULIES: I object. Page 4537, there was express direction that there would be no comment with respect to alteration. Those matters were not in evidence.

TR. RITCHIE: That was not your ruling. Your rulings were not --

TR. MARGULTES: There was a specific restriction against comment on summation.

THE COURT: The Court's ruling was that there was no right to conwent on that.

MR. RITCHIE: Your Honor's ruling was
we can't comment on the exceptions read. But in
further discussion you stated, of course, the Government can recall the evidence of the checkers and it
can recall the evidence on the delivery book page.

going to comment on that and my response was, not on the exceptions, no. I am sure he will refrain and restrict himself from doing that.

You stated yes to that.

MR. RITCHIE: I do understand. Is it your further understanding that I am not to --

altered the tallies and who got them.

MR. RITCHIE: I ask your Honor later on, can I comment to the fact that the checkers testified there was writing in addition, can I --

THE COURT: It is not in evidence.

MR. RITCHIE: Your Honor stated the portion of the tallies that can be attributed --

quantities and that's all.

MR. RITCHIE: (That's all.

MR.VERDIRAMO: Can we have an instruction as to what he has already stated?

THE COURT: The jury has just heard what was discussed. Only as to what was actually delivered, he may talk about. That was the Court's ruling.

MR. RITCHIE: With respect to the tallies, where the writing couldn't be attributed. You heard the testimony.

MR. VERDIRAMO: I object. That's exactly what you told him not to do.

Now, he is stating you can't prove who did it.

THE COURT: All you can talk about was the question of delivery but nothing else because it is not in evidence.

That's the Court's ruling.

MR. RITCHIE: (Continuing) With respect to the tallies that are not fully in evidence, if you wish you can hear the checkers testify as to what was actually delivered and you can compare it with what was on the delivery page.

From that you can draw the inference -
MR. VERDIRAMO: That's exactly what you told
him not to do. Is he hard to hear or does he not
want to listen to your Monor?

THE COURT: You are restricted from that.

That are fully in evidence. Those tallies established there were thefts. These were paper thefts accomplished with a few strokes of the pen. By a few strokes of the pen a few ditto marks, hundreds of pounds of shrimp came into the possession of drivers.

They didn't have to sign what was going on to the truck and we have the gate passes where they only have to be returned when they exited the pier and from that I submit we know they exited the pier; taking the goods off the pier and not signing for them means you have goods in your possession without any right to them.

I submit, I submit the theft has been

I submit to you, and he is trained. He doesn't look for what looks like something to somebody untrained like Anthony Bencivenga, he looks for certain characteristics, not just pictorial similarities, he looks for handwriting characteristics unique to an individual.

Now Bencivenga the next moining, and you recall the Judge instructed Mr. Bencivenga not to talk with anyone, but the next morning I again showed Mr. Bencivenga tally number 165 and I asked him, Was that your handwriting, were you down on the pier that day, did you alter any tallies that day, and he hadn't, and he took a look and he said, Well, maybe it isn't my writing, and he wasn't sure. In 7 minutes, I submit to you, you can't be sure.

But you also have got the testimony that

Anthony Bencivenga when he did alter tallies he

wasn't using his normal handwriting, whereas a checker

might be able to to a certain degree, but how can a

man who purposely alters his handwriting still pick

out what is in his handwriting.

Now with respect to the defendant Albert Grasso, with respect to that defendant, we had testimony from checkers as to what was actually delivered to his

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truck on July 25th, we had testimony concerning his signature appearing on a delivery book page, and I submit to you that if you compare the two, you will see that there is a marked discrepancy --

MR. VERDIRAMO: Objection.

Your Monor, this specifically he was told not to do, he is commenting on the tallies that are not in evidence.

MR. RITCHIE: The actual amounts are in evidence, the delivery book pages are in evidence, the checks --

MR. VERDIRAMO: The tallies are not.

THE COURT: The tallies are not.

MR. RITCHIE: The tallies are not, no, but --

THE COURT: The tallies are not.

MR. RITCHIE: I am not commenting on what was actually --

MR. VERDIRAMO: He is speaking about tallies which were not there.

MR. RITCHIE: I am talking about delivery books.

THE COURT: The tally is not here, they won't see the tallies --

MR. RITCHIE: No, they won't --

### Ritchie-summation

THE COURT: They are not in evidence.

MR. RITCHIE: (Addressing the jury.) Again on 8/1 we had the checkers' testimony as to what was actually delivered, we have the delivery book page, we have Albert Grasso's signature, and again I submit there is a marked discrepancy --

MR. VERDIRAMO: Objection, your Honor, we know of no discrepancies without that tally, and that tally is not in evidence.

MR. RITCHIE: Your Honor, there was testimony from the checkers as to what was actually delivered.

MR. VERDIRAMO: All of that testimony was stricken.

THE COURT: The tally is not in evidence.

MR. RITCHIE: That testimony was not stricken, you specifically said that.

THE COURT: There is no way of their looking because the tally itself is not in evidence.

MR. RITCHIE: They cannot look at the tallies but they can get the testimony of the checkers reread.

MR. RITCHIE: (Continuing to address jury.)

Now with respect to August 14th, ladies and gentlemen,
we have a somewhat different situation:

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#### Ritchie-summation

Hamilton, he was a Haitian, he spoke with a French accent, and he testified that certain tallies which corresponded to a gate pass and which corresponded to a regiscope which I submit has Albert Grasso's picture on it, he testified that the tallies were prepared by him, but that one particular tally on August 14th --

MR. VERDIRAMO: Objection, your Honor, he is again going into these details and they are not in evidence.

MR. RITCHIE: Your Honor, I'm not going to speak about the tallies, I'm going to give the testimony of the checker.

MR. VERDIRAMO: You can't do it directly and you can't do it indirectly.

MR. RITCHIE: I have evidence before this Court.

MR. VERDIRAMO: There is no evidence before this Court, and he knows what he is doing.

MR. RITCHIE: And proper inferences may be drawn from that evidence, your Honor.

THE COURT: Those tallies are not in evidence.

MR. RITCHIE: You refused to receive those

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tallies because of the lack of identification on the part of the government, but --

THE COURT: They are not in evidence.

MR. RITCHIE: For that reason, they are not in evidence, but the testimony of the checker is.

MR. VERDIRAMO: He can't do indirectly what you will not allow him to do directly.

I say this is prejudicial, he is commenting on something not in evidence.

I have not said a word about that, but he insists on going into things that are not before this Court simply to prejudice that jury, and it is not right.

MR. RITCHIE: Your Honor, the testimony of the checker is in evidence.

THE COURT: All the tallies are not in evidence.

MR. VERDIRAMO: I will object to each and every

word if he continues to do it.

MR. RITCHIE: Your Honor, so be it.

THE COURT: The tallies are not in evidence.

MR. VERDIRAMO: I will stand on my feet and keep objecting.

(Continued next page.)

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MR. RITCHIE: (Addressing jury) According to Gene Hamilton that was one of those tallies that was tied --

MR. VERDIRAMO: I object, your Honor.

THE COURT: Wait, wait, wait.

We are getting silly at this time of night.

MR. RITCHIE: That is right.

MR. VERDIRAMO: He, it's not me.

THE COURT: We are talking about tallies, the tallies are not in evidence, so don't discuss them.

MR. RITCHIE: I am discussing checker testimony.

MR. VERDIRAMO: He is discussing tallies.

THE COURT: You can't discuss it. All right, go ahead.

MR. RITCHIE: Let us just talk about Keith Lofton's testimony.

You will recall that during the summer of 1972
he was present when Albert Grasso was altering a tally,
he was present when that tally was botched and Albert
Grasso had to redo it, an entire tally.

Do you recall Gene Hamilton's testimony?

Now, Anthony Bencivenga testified that he knew very little about Albert Grasso, the only thing he knew is that once he saw a tally that appeared to him to be altered and he assigned it to Albert Grasso,

### Summation-Ritchia

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MR. DEL ROSSO: Your Honor, I must object.

THE COURT: Sustained.

But I admit --

MR. DEL ROSSO: Your Honor, you should instruct them not to consider that.

MR. RITCHIE: (Addressing Jury) You can infer from many facts that Carmine Piccora --

MR. MARGULIES: Your Honor, I move to strike and I ask you to instruct the Jury.

THE COURT: Yes, strike it out, it is not the real facts.

Sustained.

NR. RITCHIE (continuing): Now, with respect to
Neil Pacilio, I submit the overwhelming evidence in this
case from each and every one of our co-conspirators is
that Neil Pacilio was the foreman of the scheme, not the
boss, the foreman, the day-to-day operations manager of
the scheme. Pete Lofton has testified to payments by
Neil on one occasion when he took twenty cases, Neil came
up to him and said, "You are sure those twenty cases don't
belong on the truck?" And he said, "Yes," and a couple of
days later he and Fred Smith were paid, I believe it was
two hundred dollars a box, two hundred and fifty dollars
apiece by Neil Pacilio.

Jasper Lester similarly testified to payment by
Neil Pacilio, Jasper testified that Neil told him, "If you
steal a dime, Frigid gets a nickel." That is the deal that
went on in Frigid.

Philip Dawson, when Whitey Bencivenga said, "Why aren't you making up slacks?" He wouldn't pay any attention to Whitey, it wasn't until Neil Pacilio told him, "You do what Whitey says," that Philip Dawson did what Whitey said, and he also testified from time to time receiving four hundred dollars on two occasions from Neil Pacilio.

Now Whitey has testified in great detail about Neil Pacilio, and he has testified to the meeting in May, '72, he testified to that trip to Florida, he testified to the fact that way back in 1968 he quit Frigid because Neil Pacilio told him that he is now in on the theft, to split fifty-fifty. Whitey wasn't objecting to the stealing, he was objecting to this split.

MR. DE LUCA: Your Honor, that is an erroneous statement, it is not in the record.

That is absolutely untrue.

I realize that Mr. Pacilio is not my client, but-well, I think it certainly reflects on all the defendants
and I submit that it is an absolutely untruthful statement,

1		Bencivenga - cross/Verdiramo
MP:GA T1R2 PM	Q	You were fired because again you stole?
3	A	No, I got fired because I didn't deliver a load.
4	I didn't want	to kick in 50 percent to nobody. I wanted to get
5	fired because	I didn't want to share 50 percent with anybody.
6	I refused to	deliver a load, and I was fired.
7	Q	What you are saying is, somebody wanted you to
. 8	steal, and yo	u wouldn't steal?
9		MR. RITCHIE: Objection, your Honor.
10		THE COURT: You may answer that question.
. 11	A	If I stole, nobody forced you to steal, if I
12	stole, I would	d have to give 50 percent.
. 13	Q	That is your testimony now?
14-	A	Yes.
15	Q	Yesterday your testimony was you stole 19 cartons?
16	A	That was in '64.
17	Q	That was another time, yet?
18	A	The first time I got fired.
19	Q	The first time was for stealing?
20	A	Yes.
21	Q	No charges were pressed against you?
22	A	No, I returned the goods.
23	Q	In '68, you were fired again, isn't that right?
24	A	Yes.
25	Q	Therefore, your relationship with Frigid was not

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### Summation-Ritchie

it is not the truth.

I don't mind legitimate inferences, but when you say an untruth it is unfair.

MR. RETCHIE: It is the Jury's recollection, it is

THE COURT: All right, the Jury will determine that, it is up to the Jury.

MR. RITCHIE (Addressing Jury): Now, with respect to John Macchirole.

Now the evidence against John Macchirole again is that of the co-conspirators, but in Johnny's case don't only listen to what the co-conspirators say, listen to what the co-conspirators did because John Macchirole's company, which his father was president before him, and he hired those co-conspirators —

MR. ROSEN: Your Honor, I must object, there is no proof as to what his father did.

MR. RITCHIE: They can draw inferences, they can draw inferences that they feel are reasonable.

THE COURT: You can't have a feeling, it has to be facts in the case, I have been telling you that for twelve weeks.

MR. RITCHIE: (Addressing Jury) Well, ladies and gentlemen:

gentlemen:

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I submit there is proof that Pasquale Macchirole and John Macchirole agreed together to further this fifty-fifty split.

MR. ROSEN: Your Honor --

MR. VERDIRAMO: Objection.

THE COURT: Wait, wait.

MR. VERDIRAMO: Objection.

MR. RITCHIE: Your Honor, the testimony is --

THE COURT: Don't raise your voice and say some-

MR. RITCHIE: The testimony is there.

THE COURT: Let me --

MR. ROSEM: I object, I object, there is no testimony in all of these weeks that the father and son had any conversation together.

THE COURT: There is no such testimony, that is absolutely right, there is no such testimony that the father said any such thing.

Disregard anything to that effect.

You can draw inferences that they may have had conversations, the father and son, but not as to this case.

MR. RITCHIE: (Addressing Jury) You can infer -THE COURT: They can't, absolutely not, you cannot
infer.

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of the various defendants and I submit, if the government has done a programming job there would be no inconsistencies and it would be hard to program six people in the same way.

As far as their character, the character of our witnesses, again, are they believable?

Remember Albert Grasso? When Valentine testified --

MR. VERDIRAMO: Objection. He is forcing me to call Grasso to that stand in rebuttal.

MR. DEL ROSSO: There's nothing in the record about that --

MR. RITCHIE: Your Honor, it is in the record.

THE COURT: It was an outburst in the Courtroom and has nothing to do with the witnesses and has
nothing to do with the case and you have no right to
comment on that.

MR. MITCHIE: I wouldlike to put on ministers, priests and rabbis but you had junkies at Frigid and professional thieves.

This is the fishnet Mr. Rosen referred to -that they were thieves -- the government fishnet -MR. VERDIRAMO: Objection, your Honor.

### Ritchie-summation

MR. RITCHIE: The background of the witnesses lends credence to the government's charge for it reveals in the background of the witnesses, that Frigid was no normal company.

THE COURT: I sustain objection and make no further statements in that direction. Don't do it again.

MR. RITCHIE: Yes, your Honor.

THE COURT: The jury will disregard that statement completely. It is completely unfair and improper.

MR. RITCHIE: Yes, your Honor.

You heard the testimony of John Valentine. You may ask yourselves, "How could that fantastic charge of John Valentine's be true?"

Let's look at the witnesses hired by or at Frigid.

MR. VERDIRAMO: Objection. He is looking to draw an inference because of those witnesses and I ask for a mistrial.

THE COURT: You are not allowed to do that, members of the jury. There is no inference you can draw other than a presumption of innocence.

Mr. Ritchie, stay away from that.

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Mr. Verdiramo's' cross-examination of Keith

Lofton is probably the best picture of what was going
on over there. Ifyou recall, on cross-examination by

Mr. Verdiramo, it was learned just how much a jurkie

like Keith Lofton was able to steal in nine months.

It was taken out of him, piece by piece, as Mr.

Verdiramo said, and altogether, it totalled 50,000

pounds of shrimp, taken by a junkie, not a driver,

merely a loader.

We also had questioning concerning Mr. Lofton's addiction.

"Didn't you shoot up right on the platform?"

I submit to you, if he was doing that, what

does that say about the people looking at him and who

kept him on -- unless, they were with him in the

thieving --

MR. ROSEN: I object, your Honor. It is totally unfair comment.

MR. RITCHIE: Could be steal 50,000 pounds of shrimp in nine months on his own?

I submit to you that rather than undermining the credibility of the witnesses, the fact that they have such unsavory backgrounds in the light of this case, bolsters their credibility and the picture they

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### Ritchie-summation

consistent with that of Whitey Bencivenga and that

There is an important question and that is

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the important question of the background of the defendants.

of the other co-conspirators.

I won't argue with defense counsel --

MR. VERDIRAMO: That's obviously prejudicial and I object.

MR. RITCHIE: I'm sorry. Did I say "defendants"?

I meant, "witnesses."

It's late. It's 11 o'clock. I'm very sorry.

I didn't mean that.

THE COURT: Five more minutes, Mr. Ritchie.

MR. RITCHIE: Your Honor, you originally said an hour and 15 minutes.

THE COURT: You have spoken for an hour and 10 minutes.

MR. RITCHIE: Can I have another 15 minutes?
TH I COURT: I'll see.

MR. RITCHIE: Let's talk about programming and inconsistencies, on the other hand.

It has been charged, not charged but alluded to that the government was programming the witnesses but on the other hand it is also charged or alluded

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Rango-direct

a defendant here on trial.

MR. RITCHIE: The regiscope photo identifies the individual.

MR. VERDIRAMO: I object to him testifying unless he knows who it is.

MR. RITCHIE: I know who it is.

MR. VERDIRAMO: Oh, you know who it is.

MR. DEL ROSSO: I object to any statements before this witness by the U.S. Attorney.

MR. VERDIRAMO: Will you please preclude the Government from -- Do you want this?

THE COURT: May I see that?

MR. VERDIRAMO: Do you want this?

THE COURT: May I? You are talking too loud.

MR. ROSEN: Your Honor, I want to make a motion for a mistrial based upon Mr. Ritchie's actions right now.

THE COURT : The jury will step out.

(The jury thereupon retired from the courtroom.)

(The following occurred in the absence of the

jury:)

MR. ROSEN: Your Honor, on behalf of my client, and I would assume all of the defendants on trial, I most respectfully move for the withdrawal

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me.

MR. VERDIRAMO: By the same token, I am not going to allow him to cure this man's answer each and every time I make an objection. It is not fair to the defendants. If the man answers the question let him ask another question. That is the proper manner.

MR. ROSEN: I want to make a statement for the record. One of the jurors attempted to address

Mr. Ritchie and call him by his name before they retired. I think what is going on in front of the jury is terribly prejudicial to my defendant. The attitude at this point, Mr. Ritchie screaming in a high voice, and I want the record to reveal he is screaming in a high voice, does something to spur the jury and one of the jurors tried to address him.

Your Honor has the power to direct attorneys on both sides on how to conduct themselves. I've never seen a juror try to call attention to the United States attorney in the middle of a trial.

THE COURT: I didn't see it.

MR. ROSEN: If I am wrong, let someone challenge

(continued next page)

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What did Freddie Agnello do?

THE COURT: Who? who? Who? What was that name?

MR. RITCHIE: Freddie Agnello.

THE COURT: Where did you get Freddie Agnello from?

MR. RITCHIE: I got it from my own knowledge of the indictment.

THE COURT: You are not supposed to. He is the witness. He must tell us who these people are.

MR. RITCHIE: He doesn't know his name.

THE COURT: Where did you get Freddie Agnello from all of a sudden? There is Freddie Smith; and there is Alfred Smith. Where did you get Freddie Agnello from all of a sudden?

MR. VERDIRAMO: Your Honor, this witness said he didn't know who he was. He called him Whitey Freddie.

MR. RITCHIE: There is Freddie --

THE COURT: There are three Freddies in this case so far, Mr. Ritchie. You have no right to suggest names.

MR. RITCHIE: I wasn't suggesting anything.
THE COURT: Mr. Ritchie, you have no right

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to suggest names. You want to just ask questions.

You are going to wind up trying this case the way
it is supposed to be tried.

MR. RITCHIE: Your Honor, I cannot help it -THE COURT: Oh, yes, you can help it. You
had better help it.

MR. RITCHIE: I am submitting to you --

THE COURT: I am not going to stand for it any longer. You don't suggest anything to a witness.

And you keep quiet when I am talking.

Q What was Freddie's job?
MR. VERDIRAMO: Objection.

THE COURT: Sustained.

Q if you know.

A He was a runner on the pier.

MR. VERDIRAMO: Objection. Will your Honor please instruct the witness, when you sustain an objection, not to answer.

THE COURT: Mr. Valentine, when I sustain it you don't answer the question.

What if anything did Freddie do?
MR. VERDIRAMO: Objection, your Honor.
I am going to object to anything that Freddie did.

In the presence of Charlie Greene.

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encounter?

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because he didn't have anything to do with it? Are we going to have to go through every Agent to --

Did any Agent assigned to the investigation of this case have anything to do with your seeing Whitey?

MR. DE LUCA: How would he know, your Honor?

THE WITNESS: No. Not as far as I know.

Was it a chance encounter, or was it not a chance

MR. VERDIRAMO: Objection.

THE WITNESS: Chance --

MR. MARGULIES: Does it call for including --

MR. DE LUCA: Why Mr. Ritchie is on the defensive

I don't know.

MR. RITCHIE: I want to make --

THE COURT: I don't want to hear the argument.

Just ask questions.

Now, when you went into the Grand Jury, who or hat were you afraid of?

MR. VERDIRAMO: Objection.

THE COURT: Oh, my goodness gracious.

MR. DE LUCA: Your Honor, I ask for a mistrial.

MR. RITCHIE: Your Honor, I am asking for the --

MR. DE LUCA: You just blew it.

MR. VERDIRAMO: I have a motion.

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was asked me by the agent.

The problem was --

THE COURT: It had to be the question. If the question is not asked, you don't bother with it.

THE WITNESS: If the question is not asked

THE COURT: I suppose so, all right.

BY MR. RITCHIE:

Q In this case, Mr. Somerford, you had several hundred documents to examine, isn't that correct?

A Yes.

then we --=

And you couldn't go off and make a large number of determinations --

MR. VERDIRAMO: Objection, your Honor, there weren't several hundred documents for each individual and that's what he wants the jury to believe.

Q How many documents were you asked to compare with the handwriting of Ray Coughlin?

(continued next page.)

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### Somerford - direct

THE COURT: It is immaterial how many documents, completely immaterial.

MR. RITCHIE: Your Honor, I think it is material to show why he didn't go off on his own and make determinations other than questions posed.

THE COURT: He's an expert, Mr. Ritchie, as you are an expert in the law, he's an expert in the arts and sciences of handwriting.

MR. RITCHIE: I thank you for the compliment, but I don't claim to be.

THE COURT: Don't put that on the record.

You better take that off the record.

MR. VERDIRAMO: Can the Government get a dismissal for incompetent counsel?

THE COURT: Take that off the record. Go ahead

MR. RITCHIE: I am a young lawyer trying my best, your Honor.

MR. VERDIRAMO: Hearts and flowers.

MR. RITCHIE: It's a matter of fact, your Honor.

MR. DE LUCA: Very clever, Mr. Ritchie.

MR. VERDIRAMO: Well, score one for you today,

Mr. Ritchie.

#### BY MR. RITCHIE:

Now, you previously testified that you identified

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you are using.

MR. RITCHIE: Your Honor, I am not using it as an excuse for anything.

THE COURT: As I told you all along, and I told you yesterday, no longer will your naivete affect this Court because I do not think you are naive at all. I think some of the things you are doing are deliberate and with absolute aforethought and intentioned --

MR. RITCHIE: Your Honor, what I do I do because --

THE COURT: You do it with the idea of trying to get some point when you are going to get something out of it, whether it be an attack upon the Court or putting something into evidence that is going to cause a problem. You do it deliberately.

MR. RITCHIE: I have never attempted to put in improper evidence and I never attempted to attack the Court --

not the one to determine what is proper evidence or not. I do. And when the Court asks you to cease and desist, you should cease and desist. There have been things that you have been doing during this

inappropriate comment.

THE COURT: No question about it. That was improper likewise.

MR. RITCHIE: Mine was only in response to Mr. Verdiramo.

told you a thousand times, lawyers don't answer each other in the courtroom. They only reply when the Judge speaks to them. They don't carry on personal conversations nor comments. That is not the way to be a lawyer either.

And just because an older lawyer does it, doesn't make it right, you know.

MR. RITCHIE: Do you remember that Mr. Verdiramo --

THE COURT: They have been admonished just as much as you have for doing what you have done, as much as you have, because I do not stand it from them either.

MR. RITCHIE: I have taken all your admonishments, your Honor.

THE COURT: Well, you should.

MR. RITCHIE: Any time you have admonished

me --

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No.

Q Who is Mr. Spadafora, if you know?

A At the time, he was the delivery clerk of Pier 19, Staten Island.

Q The delivery sheets you had in front of you, do you know who prepared them?

A At the time I believe Mr. Spadafora.

Q Do you know?

A I don't know.

Q Unfortunately, I can't have what you believe, it has to be a fact.

A Yes.

Q Were there any general instructions from your company or Ned Lloyd or any other company relative to Pier 19 wherein they were told at the pier to make up new cartons in order to correct the carton count as indicated in a bill of lading?

MR. RITCHIE: I object. This is new --

MR. VERDIRAMO: It is in the 3500 material.

THE COURT: You are making him your witness?

MR. VERDIRAMO: I would be happy to.

MR. RITCHIE: I object.

Q Did Mr. Spadafora and you ever have a conversation wherein Mr. Spadafora told you that he was under

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instructions to make up new cartons, slacking, of other cartons to make up new cartons so that he could come up with the correct carton count as indicated on the bill of lading?

> MR. RITCHIE: That calls for hearsay upon hearsay.

THE COURT: I will allow it. You may answer it. MR. RITCHIE: Your Honor, I would submit the instruction, number one, is hearsay, and the conversation between Mr. Spadafora and Mr. Scheffler is hearsay.

MR. VERDIRAMO: I object to Mr. Ritchie's comments.

THE COURT: The jurors are becoming lawyers, they understand.

I did have a telephone conversation with Mr. Spadafora regarding the excessive slack cartons of reefer cargo.

What did Mr. Spadafora tell you during the conversation?

He was told by his people above him in employment, the pier superintendent or foreman, whatever have you --

MR. RITCHIE: Objection. This calls for clear -

0 What did Mr. Spadafora tell you?

A They were placing --

MR. RITCHIE: Objection.

THE COURT: I will allow it.

A They were placing the slack boxes which is the small five-pound shrimp boxes into new cartons to fill a non-delivered carton of 50 pounds.

MR. RITCHIE: I am going to move to strike that testimony. Mr. Spadafora is a named defendant in this case.

MR. VERDIRAMO: Where the --

MR. RITCHIE: This is not an admission of a party --

THE COURT: I didn't accept it as an admission.

It is a statement made to him to have more facts

before the jury. A whole door opens sometimes.

MR. RITCHIE: Fine, your Honor.

THE COURT: Sometimes it does.

Now, can you please explain to myself and to the jury what is meant by a correct carton count so as to make it equal a bill of lading, if you know?

A The cartons of shrimp are usually packed ten five-pound packages. That makes 50 pounds per carton. If a carton is broken, and there are only two or three packages within that carton, we call it a slack carton.

As soon as this conversation was held with Mr. Spadafora,

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to get immunity. His statements did not corroborate those of Mr. Valentine; Mr. Valentine's testimony with regard to that meeting in the Boondock Bar at which Mr. Pasquale Macchirole, John Macchirole and Neil Pacilio were alleged to be present.

MR. DEL ROSSO: What questions was he asked orally?

THE COURT: What did he say?

MR. RITCHIE: He said he didn't recall that meeting.

MR. DEL ROSSO: Was he asked anything else? THE COURT: He is the fellow who was the fisherman, right, the fellow with the place up in Connecticut?

THE COURT: He bought the shrimp at the Boondocks West on 17th Street --

MR. RITCHIE: He has a trucking company which deals--

MR. DEL ROSSO: Valentine gave him the name of his fish company.

THE COURT: -- and Tenth Avenue, right, Al Wade? He was supposed to take it to Connecticut.

(continued on next page.)

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A Paddy received it.

O From whom?

A Wade.

MR. VERDIRAMO: I object to this, your Honor.

This is all --

THE COURT: Paddy is not a defendant.

MR. RITCHIE: I would submit it's admissible.

THE COURT: He's not a defendant here.

MR. RITCHIE: This is done in the presence of two defendants presently on trial, Mr. John Macchirole and Mr. Neil Pacilio.

MR. VERDIRAMO: Your Honor, it is obvious that -THE COURT: He says --

MR. RITCHIE: That's what he said. That's what the testimony is.

MR. VERDIRAMO: It should be obvious that while we are keeping out the conversation of Wade, he is putting in things that Wade supposedly did without any prior foundation for them whatsoever. And I ask that the testimony of Wade be stricken from the record. If the prosecutor wants the information, let him get it question-by-question, without volunterring any --

MR. RITCHIE: I asked, What, if anything, happened.

It was done in the presence of John Macchirole and Neil

### Bencivenga - direct

THE COURT: Sustained.

Now, while you were altering the original tally, what would you use to perform the alterations?

MR. VERDIRAMO: Objection as to relevany?

MR. RITCHIE: The relevancy will be established.

I will make an offer of proof, if your Honor wishes.

THE COURT: What would you use? Tell us.

THE WITNESS: A pen.

Were there occasions when you did not use a

pen?

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A No.

> THE COURT: Sustained.

All right.

You said no?

THE WITNESS: No.

Where did you obtain the pen --Q

THE COURT: Sustained. We are not going to

try a case where you get pens from.

MR. RITCHIE: I submit it is relevant.

THE COURT: Sustained.

MR. RITCHIE: I take an exception.

THE COURT: You have an exception.

THE WITNESS: Does sustained mean I can't

answer?

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Bencivenga - direct

THE COURT: That's right.

Whenever I say sustained you just keep quiet.

THE WITNESS: Yes, sir.

Q When you went down to the pier what equipment would you take to alter the tallies?

MR. VERDIRAMO: Objection.

THE COURT: What is that?

MR. MARGULIES: The objection is that it is a leading question.

Q What equipment if any would you take to alter

MR. VERDIRAMO: Objection.

THE COURT: Sustained.

He's told us he used a pen. Sustained.

THE WITNESS: That's all I used, a pen.

Q Did you always use the same type of pen?

MR. VERDIRAMO: Objection.

A No, there would be other pens. They were all ens. It would be a pen trying to match the checker's pen.

Q And what was your reason for doing that?

THE COURT: Sustained.

MR. RITCHIE: I submit \_\_\_

THE COURT: Sustained.

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### Ben civenga - direct

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Next question.

MR. RITCHIE: Your Honor --

THE COURT: Sustained, next question.

MR. RITCHIE: I'd like to make an argument

on that.

THE COURT: Sustained. That question doesn't deserve an argument. It's obviously a bad question. Sustained.

MR. RITCHIE: I'd like --

THE COURT: Stand back, Mr. Ritchie.

Sustained.

MR. RITCHIE: I take exception.

THE COURT: Thank you.

BY MR. RITCHIE:

Now, at the time that you were altering the tallies, would you use your normal handwriting at all times?

A No, I would try to match the checker's handwriting.

Were there any particular characteristics of the style of writing that you were using?

MR. VERDIRAMO: Objection.

MR. RITCHIE: May I finish my question, your

Honor?

THE COURT: Finish your question.

## Bencivenga-direct

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THE COURT: Who was there?

THE WITNESS: Me.

THE COURT: Anybody else?

THE WITNESS: No.

THE COURT: Sustained.

MR. RITCHIE: Your Honor, I would like -=

THE COURT: Sustained.

MR. RITCHIE: I believe that I have the right to make legal argument to the Court.

THE COURT: You can believe anything you want. I sustained it at this point.

MR. RITCHIE: The relevancy -- this is a co-conspirator, in the case.

THE COURT: I know that.

MR. RITCHIE: If he is -\_

THE COURT: Do not argue before me.

Sustained. You have an exception

MR. RITCHIE: Thank you, your Honor.

Q Did you ever receive any money from Wade?

MR. VERDIRAMO: Again I object.

THE COURT: I will allow it.

Yes.

What, if anything, did you do with the money that you preceived from Wade?

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What if anything did you pay Mr. Bamonte?

MR. De LUCA: I missed that, I'm sorry.

Talk to no one. Don't answer any question,

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THE COURT: Five-minute recess.

Four hundred dollars.

either.

I paid him \$400.

THE COURT: Marshals, take him out.

(The jury left the courtroom.)

MR. ROSEN: Your Honor, I most respectfully move for the withdrawal of a juror and a declaration of a mistrial. Mr. Ritchie, who continuously is arguing with your Honor and supposedly the whiz kid of the library, citing your Honor to declarations and exceptions to hearsay, is giving the impression that your Honor doesn't know what you are talking about and I think that is most prejudicial --

THE COURT: I am not bothered by it.

MR. ROSEN: I think it affects this case and I want to move for a mistrial or a direction that

Mr. Ritchie accept your Honor's rulings as we have

to. He keeps marching back and forth saying he wants

to argue. He is creating the impression that your

Honor somehow is doing something that is not proper

### Somerford-direct

MR. RITCHIE: The tally exceptions, your Honor.

THE COURT: He said he made those alterations, Mr. Bencivenga said so. Why do we need an expert to come in and say, "Yes, he did," to buttress the testimony?

Sustained on my motion.

MR. RITCHIE: If I may explain --

THE COURT: No, you cannot.

MR. MITCHIE: There is a material value --

THE COURT: Mr. Ritchie, would you please stop and get back there now? It is too late to argue with you. Get back there. Go to something else.

MR. RITCHIE: Can I have the next one, please?
THE COURT: You can't buttress testimony.

MR. RITCHIE: It is perfectly proper. I can cite Richardson on evidence to your Honor. I will get you the section.

THE COURT: You do that and you will be held in contempt. You'd better close that book as fast as you can.

MR. RITCHIE: Yes, your Honor.

THE COURT: I've never threatened that in 19 years on the bench.

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MR. VERDIRAMO: Not only was there a specific instruction related to that in this courtroom yesterday afternoon, but you told the Government not to have that brought out in this court in any way, shape or form.

THE COURT: All right. Next question.

Q And who if anyone did you see Raymond Coughlin with on that date?

MR. ROSEN: Can we have a time, please?

THE WITNESS: It was a couple of days after. It was the 27th I think.

- Q Of what month?
- A Of September.
- Q What year?
- A 1972.
- Q And who if anyone did you see Raymond Coughlin with on that date?
  - A I seen him leave with a Waterfront agent.
- Q Who, is the question. Who did you see him with on that date?
  - A I don't understand the question.
- Q The question who -- w-h-o -- who, not what did he do. Who did you see him with that date?
  - A Waterfront agent and a Customs agent.
  - Q What if anything did you see him do?

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MR. VERDIRAMO: As to the delivery books, yes.

MR. RITCHIE: Sometimes it's only Bert.

THE COURT: Whatever he signed, it is his signature.

MR. VERDIRAMO: Whatever signature was supposed to be Mr. Grasso's, no matter how, no matter how he put it in the delivery book, I will stipulate that it is his signature, even if he signed an "X," it is his signature.

MR. RITCHIE: Your Honor, I would like to note that I asked Mr. Verdiramo for this stipulation just --

THE COURT: I have admonished you during the lunch hour for that very thing, and I said, Go on to something else. I said, Cease and desist.

Mr. Ritchie, I tell you now, don't you do it.

MR. RITCHIE: I would --

THE COURT: Step out, please.

MR. RITCHIE: This isn't the same point, your Honor. It's a different point.

THE COURT: Step out.

(Jury excused.)

THE COURT: Go ahead. What is the question you are going to ask him. Let me hear it.

MR. RITCHIE: I was going to ask you at side bar-THE COURT: Ask him now. You don't need the side

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the table. No independent recollection.

THE COURT: Is that what you are doing? Picking the names off the table?

THE WITNESS: Well, I am making sure I didn't miss anybody.

MR. VERDIRAMO: That's pretty good.

MR. DE LUCA: How about me?

Q You stole for a lot of people, and it's hard to

recall all the names?

MR. DE LUCA: I object.

MR. DEL ROSSO: I object to that.

MR. VERDIRAMO: Now he's supplying him with the --

MR. RITCHIE: I am not supplying him with anything.

I am trying to have him respond to a question in answer form.

MR. VERDIRAMO: Question and answer? I'm glad he put it that way. He gave him the question and the answer.

MR. RITCHIE: I can't give him the answer.

THE COURT: That's for sure.

MR. VERDIRAMO: You can try. You can try.

Q How many individuals did you steal with?

MR. VERDIRAMO: Objection.

THE COURT: I think we have been all through that.

That is no longer redirect.

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try the case.

Come on.

Q And who was present?

MR. DEL ROSSO: Objection, your Honor. It's already been asked and answered. I object to the question.

THE COURT: We know who was present. Let him tell us again.

Q Who else was present when Pasquale made that statement?

MR. VERDIRAMO: Objection.

MR. DE LUCA: First of all, your Honor, he never made the statement from his own mouth. He just gave him the answer. That answer comes out from him. I ask that it be stricken.

THE COURT: Just one moment. Read that part back, what he said.

(Record read)

THE COURT: Did you hear Mr. Pasquale --

MR. RITCHIE: "He" modifies --

THE COURT: -- Mr. Ritchie?

MR. RITCHIE: Your Honor, in that particular --

THE COURT: Stop it. You didn't hear it.

MR. RITCHIE: Then I would ask that the

established on each of those days.

The second question that the documentary evidence resolves is the question whether these

thefts were foreign or interstate shipments.

The bills of lading from Mollar S.S. Company establishes that these goods were in interstate --

MR. MARGULIES: This is the fourth time he made reference to interstate --

MR. RITCHIE: Interstate shipment under 469-if I say interstate shipment by mistake, read me as
saying foreign shipment.

We are talking about shipments from Bangkok, Thailand to New York.

The third question I submit the documents resolve were the goods worth more than \$100. With respect to August 1 and August 14 we have testimony from Mr. Dawson that he alone received \$400 on each occasion he turned in shrimp to Neil Pacilio.

With respect to August 23rd, the evidence is not so direct, in fact, it is fairly complicated.

Let's take the shipment represented by Government's 132 in evidence.

There's been testimony that was altered. There has also been testimony from a consignee as to

### Charge

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have been placed in evidence that you desire, you may submit that to the Court in writing and the Court will have those papers, if they are in evidence, submitted to you.

Papers marked for identification will not be submitted to you. They are not in evidence. They are merely placed on the record for the purpose of keeping a record in order so that it will be properly filed in the event of future proceedings.

Now, that is the Court's charge.

At this time, I will have to ask the attorneys several questions at side bar.

(Side-bar discussion out of the hearing of the Jury.)

MR. MARGULIES: Your Honor, I have made mention to your Clerk some of the exceptions and one is that the statute related to fraud or deception, since fraud or deception is not in the indictment, I object to your Honor telling them of the statute on fraud and deception.

Since there is a question about the tally bit, I didn't think that should come in.

There were certain defendants who were exculpated.

It is charged in the indictment that the conspiracy was charged against those defendants and the Jury should know

### Charge

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that these defendants conspired with the others, but the others were let out.

When you took the names out I submit that prejudiced the defendants.

MR. RITCHIE: Those names were read to your Honor.

THE COURT: That was dismissed as to all counts. I thought you requested theme

MR. MARGULIES: We wanted them in, but they were omitted from the overt acts.

One of the overt acts involved Conti, but was taken out.

MR. RITCHIE: The reference to all co-conspirators other than the defendants at the trial were taken out including Dawson.

MR. MARGULIES: In the conspiracy statute it indicated there could be a conspiracy in violation of law and this could only be a violation of a specific law --

THE COURT: I am not going to re-charge them on that because it will be compounded by re-charging.

I will leave it alone.

I thought you requested to have the names placed on there.

MR. MARGULIES: We wanted them in.

THE COURT: Since you wanted them, I will do it.
I was not advised of this.

Did you tell my Clerk you wanted it in on overt act number two?

MR. RITCHIE: To prevent prejudice to the Government, if you are going to point out Joseph Conti, a number of other names were deleted in the count.

THE COURT: They had to be in the counts.

MR. MARGULIES: When talking in terms of nonshipment, your Honor charged about the presumption that
comes from proof of bill of ladings and I submit that
could only be if the Jury is satisfied beyond a
reasonable doubt.

THE COURT: No question about that.

MR. MARGULIES: The inference can be drawn that there is a presumption to be drawn unless evidence is submitted to the contrary.

The next thing, there is some language that I did not understand and I think it is at the bottom of Page--

THE COURT: Didn't you have these exceptions before I charged?

MR. MARGULIES: I gave them to the Law Clerk in writing.

THE COURT: When I asked for exceptions, you should have placed them on the record then and I know

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what to do with them at that time.

This is unfair.

MR. RITCHIE: I have no exceptions.

MR. VERDIRAMO: No exceptions.

(In hearing of the Jury.)

THE COURT: I have nothing else to charge the Jury. The Jury may be escorted to the Jury Room. Swear in the Marshals.

(At this time the Marshals were sworn and the Jury withdrew at 12:40 p.m. to deliberate.)

(Out of hearing of the Jury.)

THE COURT: This Court submitted to the defendant's attorneys a full charge it intended to deliver to the Jury and at no time was there any exceptions made after the Court had been advised they were read.

After the Court delivered the Charge to the Jury, at that time one of the defendant's attorneys, Mr.

Margulies, steps forward and says he has exceptions to the Charge and that is totally unfair and totally unjustified and should not have been done.

MR. MARGULIES: I apologize.

THE COURT: No, I will not take an apology.

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### Charge

A separate crime or offense is charged against each of the defendants in each count of the indictment.

Each offense, and the evidence pertaining to it, should be considered separately. The fact that you may find one of the accused guilty or not guilty of one of the offenses charged should not control your verdict as to any other offense charged against the other defendants.

It is your duty to give separate, personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants. Each defendant is entitled to have his case determined from evidence as to his own acts and statements and conduct, and any other evidence in the case which may be applicable to him.

You are here to determine the guilt or innocence of the defendants here charged from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person or persons. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the accused persons, you should so find, even though you may believe one or

Charge

your duty to find the defendants not guilty.

able doubt remains in your minds after impartial consideration of all the evidence in the case, it is

If any reference by the Court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

The punishment provided by law for the offense(s) charged in the indictment is a matter exclusively within the province of the Court, and should never be considered by the Jury in any way, in arriving at an impartial verdict as to the guilt or innocence of the accused.

Now, in this type of case there must be a unanimous verdict, that means all twelve of you must agree, and it goes without saying, that it becomes incumbent upon you to listen to one another and to argue out the points among yourselves in order to determine in good conscience whether your fellow jurors' argument is one commensurate with yours or whether at least you can with good conscience agree with him. You have no right to stubbornly and idly sit by and say, "I am not talking to anyone," "I am not going to discuss it," because people with common sense and the ability to

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# REQUEST NO. 37

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

#### Charge

the jury first finds that he is guilty of the conspiracy charged in Count 14 - should they find any conspiracy at all.

You are instructed that you may not consider against any defendant, any act or declaration or statement made by any of his co-defendants out of his presence as tending in any manner to establish his guilt, unless you first find that the following situations exist:

- 1. that the act, declaration, or statement was made during the existence of the alleged conspiracy;
- 2. that the act, statement or declaration was done or made in furtherance of the object of the conspiracy;
- 3. and that the defendant is himself shown to have been a member of the conspiracy by his own acts and statements.

If any of the three situations does not exist, then you may not consider acts and declarations of alleged co-conspirators against defendant.

Anthony Bencivenga, Philip Dawson, Gerard Ruggerio,
Jasper Lester, Keith Lofton, and John Valentine, I
charge you as follows:

"Hearsay utterances" are defined as statements

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charge

testified to by the witness which are mere repetition of what the witness has heard others say, and are not within the personal knowledge of the witness.

Hearsay utterances may be considered along with all the other evidence in determining whether you are convinced of the individual defendant's guilt beyond a reasonable doubt.

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Now, there are in any case, and in this one, two types of evidence from which a jury may properly find a defendant guilty of a crime, one is direct evidence such as testimony of an eyewitness, the other is circumstantial evidence which is proof of a chain of facts and circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant the jury must be satisfied of the defendant's guilt

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES GREEN, FRED SMITH and ALBERT GRASSO,

Appellants,

Docket No. 75-1037

- Against -

CERTIFICATE OF SERVICE

UNITED STATES OF AMERICA, :

Appellee.

I, VINCENT L. VERDIRAMO, ESQ., Attorney for
Petitioners in the within cause of action, do hereby certify
that on this 1st day of April, 1975, I served the attached
Brief and Appendix upon Lauren S. Kahn, Attorney, Appellate
Section, Criminal Division, c/o T. George Gilinski, Ben Franklin
Station, P.O. Box 899, Washington, D.C. 20044, by depositing
a copy in the United States mails, postpaid, and mailed to her
at the aforesaid address by Certified Mail, Return Receipt
#721541.

Yours, etc.,

VINCENT L. VERDIRAMO,
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3163 KENNEDY BOULEVARD
JERSEY CITY, NEW JERSEY07306
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